Supreme Court, U.S.
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No. 03-____

In The

Supreme Court of the United States

OCTOBER TERM, 2003

LOUIS R. KOERNER, JR.,
Petitioner

v.

THE GARDEN DISTRICT ASSOCIATION, MICHELLE O. LANDRIEU, PAUL MAY, AND THE CITY OF NEW ORLEANS,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL FOR THE FIFTH CIRCUIT

PETITION OF LOUIS R. KOERNER, JR. FOR A WRIT OF CERTIORARI

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March 15, 2004

QUESTIONS PRESENTED

1. Does the decision of the United States Court of Appeals for the Fifth Circuit establish a conflict with this Court's jurisprudence as this case does not implicate the concerns that this Court relied upon in *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S. Ct. 1098, 87 L. Ed. 1424 (1943), *Colorado River v. United States,* 424 U.S. 800, 818, 819; 96 S. Ct. 1236; 47 L. Ed. 2d 483 (1976), and *New Orleans Public Service, Inc. v. New Orleans*, 491 U.S. 350, 105 L. Ed. 2d 298, 109 S. Ct. 2506 (1989) in order to justify a stay of proceedings in the courts of the United States, and does it also conflict with the decisions of the Second, Third, Fourth, Seventh, Ninth and Eleventh Circuits in *Planned Parenthood of Dutchess-Ulster, Inc. v. Steinhaus*, 60 F.3d 122 (2nd Cir. 1995), *Heritage Farms, Inc., v. Solebury Township*, 671 F.2d 743 (3rd Cir. 1982), *Felmeister v. Office of Attorney Ethics*, 856 F.2d 529 (3rd Cir. 1988), *Izzo v. Borough of River Edge*, 843 F.2d 765 (3rd Cir. 1988), *Neufeld v. The City of Baltimore*, 964 F.2d 347, (4th Cir. 1992), *Woods Inn, Inc. v. Howard County*, 124 F.3d 597 (4th Cir. 1997), *International College of Surgeons v. City of Chicago*, 153 F.3d 356 (7th Cir. 1998), *Kern-Tulare Water District v. City of Bakersfield*, 828 F.2d 514 (9th Cir. 1987), *Rindley v. Gallagher*, 929 F.2d 1552 (11th Cir. 1991)?

2. Did the failure to insist that the district court provide written reasons detailing compliance with this Court's mandatory standards for abstention conflict with *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S. Ct. 1098, 87 L. Ed. 1424 (1943), *Colorado River v. United States,* 424 U.S. 800, 818, 819; 96 S. Ct. 1236; 47 L. Ed. 2d 483 (1976), and *New Orleans Public Service, Inc. v. New Orleans*, 491 U.S. 350, 105 L. Ed. 2d 298, 109 S. Ct. 2506 (1989) where this Court stated that the federal courts have an unflagging obligation to exercise their jurisdiction, unless some specific abstention criteria are present like, which criteria were carefully explained and analyzed by the Ninth Circuit in *United States v. Morros*, 268 F.3d 695 (9th

Cir. 2001) and does it also conflict with *Heritage Farms, Inc., v. Solebury Township*, 671 F.2d 743 (3rd Cir. 1982) in that if there is to be abstention, the district court must state the specific facts upon which its decision is made?

3. Is there a difference in the standard of review between a determination that abstention may be appropriate which is reviewed *de novo* and the justification by the district court by reference to abstention factors, which is reviewed for abuse of discretion, so that in the absence of any analysis of the abstention criteria, the court of appeal should have reviewed *de novo* the granting of the stay by the district court as was done by the Ninth Circuit in *Fireman's Fund Ins. Co. v. Quackenbush*, 87 F.3d 290, 294 (9th Cir. 1996), *City of Tucson v. U.S. West Communications, Inc.*, 284 F.3d 1128 (9th Cir. 2002), *Wallis v. Mock*, 2003 U.S. App. LEXIS 12668 (9th Cir. 2003) and in *Pallack v. Homestead Insurance Company*, 2003 U.S. App. LEXIS 7350 (9th Cir. 2003), so that its failure to do so established a conflict with the 9th Circuit.

PARTIES TO THIS PROCEEDING

Petitioner is Louis R. Koerner, Jr., plaintiff in the district court and appellant in the court of appeal.

Respondents are The Garden District Association, et al., defendants in the district court and appellees in the court of appeal.

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Appendix D – City of New Orleans Zoning Ordinance Excepts and Prescriptive Statute on Acquiring Non-Conforming Uses by Prescription 12a

Petitioner, Louis R. Koerner, Jr. respectfully petitions for a writ of certiorari to review the judgment of the Fifth Circuit Court of Appeals in this case.

OPINIONS BELOW

The decision of the Fifth Circuit appears at appendix A and is reported at 2003 U.S. App. LEXIS 21739 (5th Cir. La. 2004). The denial of rehearing *en banc* and the denial of panel rehearing (App. B) are not reported. The district court opinion appears at appendix C and is not reported.

GROUNDS FOR JURISDICTION

This Honorable Court has jurisdiction in this cause pursuant to 28 U.S.C. §§ 1254(1), 2101(c). The United States Court of Appeals for the Fifth Circuit rendered the decision below on October 24, 2003. Rehearing *en banc* and panel rehearing were denied on December 16, 2003.

STATEMENT OF THE CASE

Petitioner, Louis R. Koerner, Jr., is an attorney at law who has practiced law in his house in the Garden District (New Orleans, Louisiana) since he purchased it in 1979. After practicing law continuously for almost twenty years, petitioner applied for a permit to establish a bed and breakfast for his house in 1997, which the City of New Orleans denied and the Board of Zoning Adjustment refused to overturn. Upon Koerner's appeal, the state courts affirmed the zoning decision stating that the entirety of the house had not acquired a non-conforming use although the law office was allowed under the zoning ordinance but granted no other relief. The Louisiana appeals court affirmed (726 So. 2d 435) but also held that Koerner had acquired a non-conforming use as to his number of employees and could employ up to five employees. This case became final on January 9, 1999 (The Louisiana Supreme Court denied writs on April 23, 1999).

Not satisfied by the denial of the bed and breakfast license

or by the fact that Koerner **never** utilized his home as a bed and breakfast and did not otherwise expand his nonconforming use, the City, encouraged by the GDA, filed a motion for contempt concerning Koerner's long-time use of the property as a law office even though no affirmative relief had been requested or granted to the City and even though there was no new use of the property. Unsurprisingly, the contempt motion was dismissed on the merits on March 20, 2000.

Again not satisfied by the dismissal of its contempt motion, but not taking an appeal, the City and other municipal officials retaliated against Koerner by retroactively revoking his homestead exemption without giving any reason,[1] issuing a criminal citation for failure to have an occupational license as an attorney, and refusing to issue an occupational license on the pretext that his home was not zoned to be the law office that had operated since 1979. The City also stated to all that inquired that Koerner was operating an illegal law office because he had non-resident employees, even though he was operating within the bounds set by the Louisiana appeals court.

In order to seek redress and surcease from the illegal activities of the City and its allies, Koerner filed a complaint (July 26, 2000) in federal district court against the City, its zoning administrator, the assessor (Betty Jefferson, sister of Rep. William Jefferson), and the Garden District Association seeking injunctive and declaratory relief and damages pursuant to 42 U.S.C. § 1983 for denial of equal protection and other

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[1] As the time of the revocation of his homestead exemption, The Jackson Avenue Foundation, of which Koerner was co-chairman and attorney, was in litigation with the assessor's daughter over the assessor's scheme to purchase historic property and then demolish it as a parking lot, had obtained injunctive relief, and was moving for a judgment of contempt for its violation.

violations of his constitutional rights.

Although the GDA was dismissed in an interlocutory ruling in December of 2001 (2001 U.S. Dist. LEXIS 21810; E.D. La 2001), the motions to dismiss of the City of New Orleans and Paul May individually and of Assessor Jefferson were denied on March 28, 2002 (2002 U.S. Dist. LEXIS 6306; E.D. La 2002). On October 12, 2002, the criminal action against Koerner in the Municipal Court for the City of New Orleans was dismissed for lack of subject matter jurisdiction. On January 24, 2003, Assessor Jefferson entered into a consent judgment reinstating Koerner's homestead exemption and refunding the amounts wrongfully paid in additional taxes.

In 2001, the Garden District Association filed a state-court petition for injunction to enjoin Koerner from using his house in a manner that violated the zoning.

On March 26, 2003, and after soliciting a motion to stay at the final pretrial conference, the district court ordered the matter stayed, stating that there are "state court issues that are intertwined with the issues presented to the Court in the above-captioned case."[2] The one-page decision contained no justification of the stay, no reference to the type of abstention relied upon, no citation to any law, nor any discussion of any of the abstention factors established by this Court and the courts of appeal. Koerner appealed to the United States Court of Appeal for the Fifth Circuit. The Fifth Circuit affirmed the lower court's decision to abstain under *Burford*. Its attempted justification for the lack of written reasons was the statement that "the order adopted the reasoning set forth by the GDA in its motion to stay by stating that it had received that motion and was granting it, finding that the issues presented in the state proceeding were intertwined with the issues presented in

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[2] See Appendix C, 11a.

this matter. Considering the facts of the case and the contents of the motion to stay, the trial court's one-page order was found sufficient"[3]. Panel and *en banc* rehearing were denied.

A. The Consequences of the Decision Below

Importance of the Issue

The Fifth Circuit affirmed an order that permitted abstention without any reasoning, any citation to authority, even the type of abstention utilized, and without any discussion of the factors mandated to be considered before refusing to exercise the unflagging duty of the district court to exercise its jurisdiction. It permitted a district court to stay a case found troubling without justifying the exercise of its use of discretion.

This decision to affirm the district court's abstention under *Burford* conflicts with the decisions of this Court and other federal circuits and therefore threatens the uniformity of the jurisprudence concerning *Burford* abstention, the extent of the discretion of the district court, and whether the failure to articulate compliance with the abstention standard is an abuse of such discretion to be reviewed *de novo*.

B. Proceedings Below

The original complaint was filed in July 26, 2000, asserting constitutional and state claim claims and included a request for preliminary injunction prohibiting the defendants from:

1. Instituting groundless contempt proceedings or other civil or criminal proceedings against Koerner, the purpose of which is to wrongfully deprive him of his constitutional rights or discourage their assertion;

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[3] See Appendix A, 7a-8a.

2. To wrongfully deprive him of the benefit of his homestead exemption;

3. To assess his immovable property, 1204 Jackson Avenue, in a manner which constitutes a denial of equal protection;

4. To enforce or threaten to enforce unequally against him the occupational licensing law of the City of New Orleans.

The City's motion to dismiss or for summary judgment contending that Koerner's suit constituted an improper attempt to appeal the zoning decisions of the state court and that the court lacked subject matter jurisdiction were denied. *Koerner v. The Garden District Association*, 2002 U.S. Dist. LEXIS 6306 (EDLA 2002).

After the initial scheduling order, Koerner attempt to file a first amended complaint and jury demand, asking for the following relief, *inter alia*:

1. Declaring that defendants violated 42 U.S.C. § 1983 by denying plaintiff his right to the equal protection of the laws, procedural due process, substantive due process, and his property and property rights and threatened his liberty without due process.

2. Declaring that further judicial or administrative action against the use of 1204 Jackson Avenue was barred on account of the running of the applicable prescription of two years from May 1, 1997 for the non-conforming use of this property described in the letter of May 1, 1997 to Paul May and the diagram enclosed of the property and entering the appropriate judgment.

3. Declaring that further judicial or administrative action against the use of 1204 Jackson Avenue based on Koerner's use of the said property as a law office and offices of civic and

charitable associations without any limitation of percentage or number or character of employees is barred by res judicata on account of the failure of the City of New Orleans to file a reconventional demand or any other request for affirmative relief in the Koerner v. City of New Orleans litigation in Civil District Court for the Parish of Orleans.

On December 30, 2002, Koerner filed his first amended complaint revised in accordance with the order of Magistrate Judge Roby issued on December 26, 2002. Koerner asserted denial of equal protection of the laws, denial of procedural due process concerning the revocation of the homestead exemption and the filing of a meritless motion for contempt, denial of substantive due process, and intentional deprivation of civil rights by malicious civil and criminal proceedings in order to retaliate against the plaintiff. There were also state law claims.

Koerner has engaged in extensive written discovery and depositions to get the case ready for trial. It was during the February 20, 2003 pre-trial conference and just before trial that the district court suggested a stay motion to GDA counsel.

The federal case was stayed pending the state court's decision on injunctive relief, but this disposition in the state court does not finalize anything concerning Koerner's claims for damages arising from the meritless criminal and civil proceedings filed by the City that violated his constitutional rights. It cannot resolve the damage claim caused by the City's allegation that he operated his law office illegally nor the wrongful refusal by the City to issue to him an occupational license. The stay merely delays disposition in federal court.

Despite this, the Fifth Circuit affirmed the district court's abstention under the *Burford* doctrine. Rehearing *en banc* and panel rehearing were denied on December 16, 2003.[4]

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[4] See Appendix B, 9a-10a.

REASONS FOR GRANTING THE WRIT

The Decision of the Fifth Circuit Court of Appeals, on an Important Federal Question, Conflicts with Decisions of This Court and with Those of Other Circuits.

A. The Issues as Framed by the Court of Appeal

According to the court of appeal:

> The only remaining claims in this matter are: (1) alleged constitutional violations pertaining to the City's attempted enforcement of the Comprehensive Zoning Ordinance and the citation of Koerner for failing to have the requisite occupational law license; and (2) the City's defenses to those claims. The allegations made by Koerner depend on whether he has obtained a non-conforming use of 1204 Jackson, which is the issue presented in the parallel state proceeding.
>
> Federal courts have a duty to exercise the jurisdiction conferred upon them by Congress and abstention is the exception not the rule. *Wilson v. Valley Electric Membership Corp.*, 8 F.3d 311 (5th Cir. 1993). However, a number of abstention doctrines have been recognized by the Supreme Court, including the doctrine recognized in *Burford v. Sun Oil Company*, 319 U.S. 315, 63 S. Ct. 1098, 87 L. Ed. 1424 (1943).
>
> In applying *Burford* abstention, the court does not necessarily consider whether the cause of action is based on state or federal law, but instead looks at whether the plaintiff's claim is entangled in an area of state law that must be untangled before the federal case can proceed. Where timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are

difficult questions of state law bearing on policy problems of substantial import whose importance transcends the result in the case at bar; or (2) where the exercise of federal review of the questions in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a mater of substantial public concern.

Five factors have been identified to consider in making this determination: (1) whether the cause of action arises under state or federal law; (2) whether the case requires inquiry into unsettled issues of state law or into local facts; (3) the importance of the state interest involved; (4) the state's need for a coherent policy in the area; and (5) the presence of a special state forum for judicial review. Wilson, 8 F.3d at 314. These factors support the trial court's determination to abstain in the current matter pending resolution of the parallel state proceeding.

Even though Koerner has framed his claims as arising under federal law, the underlying issues presented are purely state law issues. Koerner has alleged that the City's enforcement of the Comprehensive Zoning Ordinance and the Occupational Licensing law was wrongful. He has not alleged that these statutes are defective, only that their application to him is unconstitutional. Whether Koerner has established a non-conforming use of his property is purely a state law issue which should be decided in accordance with the adjudicatory process established to address zoning issues. The same is true of whether he has obtained an occupational license.

Further, the second, third, and fourth factors recognized by Wilson also favor abstention. Courts have recognized local land use and zoning as areas where

local interest and coherent policy are necessary. *Pomponio v. Fauquier County Bd. of Supervisors*, 21 F.3d 1319, 1327 (4th Cir. 1994), cert. denied, 513 U.S. 870, 115 S. Ct. 192, 130 L. Ed. 2d 125. The court in *Pomponio* stated that federal courts should not leave their indelible print on local and state land use and zoning law by entertaining these cases, and, in effect, sitting as a zoning board of appeals.

Finally, the fifth Wilson factor is present in this case. The City of New Orleans, the Board of Zoning Adjustment, and the Louisiana state courts have provided Koerner a forum for his grievances. The City determined in 1997 that Koerner had not achieved a nonconforming commercial use of his property. Thereafter, Koerner appealed that determination to the Board of Zoning Adjustment, which affirmed the decision. Koerner then appealed that determination to the Civil District Court for the Parish of Orleans and the Louisiana Fourth Circuit Court of Appeals. The denial of his non-conforming use was upheld.

The GDA Enforcement Action, the parallel state proceeding, is an action to enforce the determination already made by the BZA, and the Louisiana state courts. Koerner is now seeking to have the federal courts once again determine whether he has obtained a non-conforming use of his property. The trial court properly rejected this attempt by abstaining to inject the federal courts into such local issues.[5]

The Court held further:

Koerner argues that the trial court's order staying this

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[5] See Appendix A, 5a-8a.

matter was deficient because it did not contain an analysis of the *Burford* abstention doctrine. However, the order adopted the reasoning set forth by the GDA in its motion to stay by stating that it had received that motion and was granting it, finding that the issues presented in the state court proceeding were intertwined with the issues presented in this matter. The motion to stay was based solely on *Burford* abstention. Considering the facts of the case and the contents of motion to stay, the trial court's order was sufficient.

B. Affirmance by the Court of Appeals of the Stay Order Under *Burford* Abstention Was Error and Conflicted with Decisions of This Court and Other Circuit Courts of Appeal

The court of appeal erred when it affirmed the district court's order to stay in favor of the state action because the state court issues "are intertwined" with the issues presented in the federal court.[6] The failure of the court of appeal to reverse this decision constituted an error of law and established a conflict with the decisions of the Second Circuit Court of Appeals in *Planned Parenthood of Dutchess-Ulster, inc. v. Steinhaus*, 60 F.3d 122 (2nd Cir. 1995), the Third Circuit Court of Appeals in *Heritage Farms, Inc., v. Solebury Township*, 671 F.2d 743 (3rd Cir. 1982), *Felmeister v. Office of Attorney Ethics*, 856 F.2d 529 (3rd Cir. 1988), *Izzo v. Borough of River Edge*, 843 F.2d 765 (3rd Cir. 1988), the Fourth Circuit Court of Appeals in *Neufeld v. The City of Baltimore*, 964 F.2d 347, (4th Cir. 1992), *Woods Inn, Inc. v. Howard County*, 124 F.3d 597(4thCir.1997), the Seventh Circuit Court of Appeals in *International College of Surgeons v. City of Chicago*, 153 F.3d 356 (7th Cir. 1998), the Ninth Circuit Court of Appeals in *Kern-Tulare Water District v. City of Bakersfield*, 828 F.2d 514 (9th Cir. 1987) and the decision of the Eleventh Circuit

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[6] See Appendix C, 11a.

Court of Appeals in *Rindley v. Gallagher*, 929 F.2d 1552 (11th Cir. 1991), and this Court's decisions in *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S. Ct. 1098, 87 L. Ed. 1424 (1943).

In *New Orleans Public Service, Inc. v. New Orleans*, 491 U.S. 350, 361 105 L. Ed. 2d 298, 109 S. Ct. 2506 (1989) (NOPSI), this Court succinctly reiterated the facts required for *Burford* abstention. Quoting *Colorado River v. United States*, 424 U.S. 800, 818, 819; 96 S. Ct. 1236; 47 L. Ed. 2d 483 (1976), this Court stated that *Burford* abstention is appropriate:

> (1) when there are difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar; or (2) where the exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.

This Court also held in *New Orleans Public Service, Inc. v. New Orleans*, 491 U.S. 350, 361:

> In NOPSI, however, the Court made clear that the mere presence of complex state administrative processes does not necessarily require abstention, even where there exists a potential for conflict between federal and state law.

The Fifth Circuit correctly referenced the *Burford* requirements but applied them incorrectly. It relied heavily on *Pomponio v. Fauquier County Board of Supervisors*, 21 F.3d 1319 (4th Cir. 1994) to hold that the second, third and fourth factors to determine if the *Burford* abstention was warranted were fulfilled. However, even if part of Koerner's allegation as to his prescriptive acquisition of the use of more than 15% of his house as a law office involved the application of the New Orleans Zoning Ordinance, this does not imply that

because there is a zoning issue, *Pomponio* abstention is warranted.

To the contrary is *Heritage Farms, Inc. v. Solebury Township*, 671 F.2d 743 (3rd Cir. 1982), where the court held that the plaintiff's allegation that members of the board used their governmental offices to further an illegal conspiracy to destroy plaintiff's constitutional rights to conduct a legitimate business was not simply a land use case. The court considered the plaintiff's allegations of defamation and an attempt by defendants to persuade financial institutions not to lend to the plaintiff. Distinguishing these allegations from simple matters of land use and development policy (671 F.2d at 748), the court held that:

> It is incumbent upon district courts, faced with a claim arising out of land use questions, to examine the facts carefully to determine what the essence of the claim is. If it is an unlawful conspiracy like the one alleged here, the mere presence of land use issues should not trigger a mechanical decision to abstain. (671 F.2d at 748.)

The *Heritage* court concluded that *Burford* abstention could not apply. As in *Heritage*, Koerner not only alleged that his use of more than 15% of his house as a law office meant that he has established a non-conforming use, but also that he has suffered damages from defamation, from the wrongful criminal and civil proceedings brought against him, from the City's wrongful refusal to issue an occupational license to him and other attorneys legally employed on the premises, and from the failure to assess the real value of his house.

Moreover, the Koerner case does not involve any difficult questions of state law nor would the exercise of federal jurisdiction be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern. See *Neufeld v. The City of Baltimore*, 964 F.2d 347 (4th Cir. 1992), where Baltimore City notified Neufeld that he had

installed his satellite dish in violation of its zoning laws. In reversing abstention, the court stated:

> The district court did not have before it a case involving difficult questions of state law involving peculiarly local concerns. Moreover, exercising federal jurisdiction would not have disrupted a coherent state policy by subjecting the provisions of the zoning ordinance to varying interpretations. (964 F.2d at 349)

In *Izzo v. Borough of River Edge*, 843 F.2d 765 (3rd Cir. 1988), a local zoning board refused to allow an amateur radio operator to extend the height of his transmission tower. The district court's abstention citing state concerns over land use regulation was reversed:

> [...] a system of land use regulation may be of special interest to a state and a municipality; however, the scheme at hand does not approach the complexity of the one under scrutiny in *Burford*. The issue here is not so technical that it requires the district court to become enmeshed in a highly specialized area inconsistent with resolution of a relatively minor federal concern. Nor will the federal court's decision have a potentially far-reaching effect in the area of land use regulation. In contrast, the federal intrusion is very limited and unlikely to nullify any substantial portion of the regulatory program. (843 F2d at 769)

There were no difficult questions of state law involving peculiarly local concerns before the *Izzo* court. Moreover, exercising federal jurisdiction would not have disrupted a coherent state policy by subjecting the provisions of the zoning ordinance to varying interpretations. (964 F.2d at 350.)

In *International College of Surgeons v. City of Chicago*, 153 F.3d 356 (7th Cir. 1998), the court ruled that the district

court was not required to abstain from exercising jurisdiction:

> Indeed, the courts have recognized that land use regulations implicate issues that are primarily of local concern. See *Louisiana Power & Light Co. v. Thibodaux*, 360 U.S. 25, 28, 3 L. Ed. 2d 1058, 79 S. Ct. 1070 (1959) (stating that eminent domain concerns "turn on legislation with much local variation interpreted in local settings"); see also *Pomponio v. Fauquier County Bd. of Supervisors*, 21 F.3d 1319, 1326 (4th Cir.) (en banc) (stating that challenges to state or local zoning or land use laws, "when stripped of the cloak of their federal constitutional claims . . . are really state law claims because it is either the zoning or land use decisions, decisional processes, or laws that are the bases for the plaintiffs' federal claims."), cert. denied, 513 U.S. 870, 130 L. Ed. 2d 125, 115 S. Ct. 192 (1994). However, *Burford* abstention is rarely, if ever, appropriate when "the state law to be applied appears to be settled." *Colorado River*, 424 U.S. at 815. In fact, even in cases involving state land use issues, a district court must not decline jurisdiction where its exercise "would . . . not require the District Court to guess at the resolution of uncertain and difficult issues of state law." *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 187, 3 L. Ed. 2d 1163, 79 S. Ct. 1060 (1959); cf. *Thibodaux*, 360 U.S. at 29.

The *Izzo* court noted further that:

> As we noted above, the second type of *Burford* abstention is appropriate only in those cases in which the exercise of federal review would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern. See *Quackenbush*, 517 U.S. at 727. Again, there can be no doubt that the Landmarks Ordinance represents an

> effort by the City of Chicago to establish a coherent policy regarding a matter of substantial public concern- - the preservation of historically and architecturally significant real estate. However, this alone is not enough to warrant abstention.

In order to have this second type of *Burford* abstention, there had to be a special forum in which such claims may be litigated. In this case, the Board of Zoning Adjustment is not such a special forum and the zoning claims other than the non-conforming use of the entire house were not litigated.

In *Kern-Tulare Water District v. City of Bakersfield*, 828 F.2d 514 (9th Cir. 1987), the court held that a federal court ruling involving state water and water right policy was not disruptive of state efforts to establish coherent policy with respect to municipal control over water and water rights:

> But the mere involvement of an area of state law which is the subject of detailed regulation does not make abstention appropriate. See 670 F.2d at 817. Our adjudication might possibly create conflict with state law; but the mere potential for conflict, without more, does not warrant abstention either. See *Colorado River Water*, 424 U.S. at 815-16; *Turf Paradise*, 670 F.2d at 820. The question instead is whether such potential conflict would impermissibly impair California's efforts to establish policy regarding the regulation of water and water rights. We answer in the negative. We are called upon to adjudicate the District's federal antitrust claims. The only potential impact on the state arising from federal adjudication of those claims is the limitation of the District to the state courts if it wishes to pursue those claims which are not precluded by state action immunity. That result does not affect in the slightest California's ability to take acts necessary to regulate water and water rights, including measures aimed at

> precluding waste and unreasonable use. The district court thus correctly concluded that *Burford* abstention was inappropriate. (828 F.2d at 517-518)

Here, the zoning ordinance is not complex and its interpretation by the federal court would not have affected the City's ability to have a coherent zoning policy. On the contrary, the parties simply asked for the application of the zoning ordinance.

Other circuits hold that when the state law implicated is not complex and when federal review does not disrupt public policy, *Burford* abstention is inappropriate. *Planned Parenthood of Dutchess-Ulster, Inc. v. Steinhaus*, 60 F.3d 122 (2nd Cir. 1995), *City of Tucson v. U.S. West Communications, Inc.*, 284 F.3d 1128 (9th Cir. 2002), *Felmeister v. Office of Attorney Ethics*, 856 F.2d 529 (3rd Cir. 1988).

Finally, as stated above in *Heritage Farms,* 671 F.2d at 748, district courts must carefully examine the facts, so that, when there is an abstention, the district court must state that facts upon which its decision is made, a requirement completely ignored here. No factual statement is contained in the district court's order herein.

More importantly, the district court's order contains no statement of analysis of any of the *Burford* abstention requirements. In *United States v. Morros*, 268 F.3d 695 (9th Cir. 2001), it was held that:

> Because the federal courts' obligation to adjudicate claims within their jurisdiction is "virtually unflagging," abstention is permissible only in a few "carefully defined" situations with set requirements. We review de novo whether the facts of the instant case conform to these requirements. If they do, we review the district court's decision to abstain for an abuse of

discretion. (268F.3d at 703)

The court of appeal the analyzed the three requirements to see whether abstention was warranted and found that none of these criteria were met in that case (268F.3d at 705). In Koerner's case, the district court did not "carefully define" the situation with an analysis of compliance with the set of requirements.

Also, in *City of Tucson v. U.S. West Communications, Inc.*, 284 F.3d 1128 (9th Cir. 2002), the court of appeal stated:

> We review *de novo* whether the requirements for abstention have been met. *Fireman's Fund Ins. Co. v. Quackenbush*, 87 F.3d 290, 294 (9th Cir. 1996). When the requirements for abstention are present, we review the district court's decision to abstain for an abuse of discretion. (284 F.3d at 1132)

Likewise, in *Wallis v. Mock*, 2003 U.S. App. LEXIS 12668 (9th Cir. 2003) and in *Pallack v. Homestead Insurance Company*, 2003 U.S. App. LEXIS 7350 (9th Cir. 2003), the court of appeals held that they reviewed *de novo* whether the requirements for abstention had been met.

However, in order to make such a review, a court of appeal can only look at the district court's stated reasons to abstain. Here, not only did the district court not state under which abstention it abstained but it also did not analyze any of the abstention requirements. Accordingly, the Fifth Circuit should have made a *de novo* review of the district court's abstention and not reviewed it for abuse of discretion.

CONCLUSION

For all these reasons, Petitioner requests that this Court grant his Petition for Certiorari.

Respectfully submitted,

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APPENDIX A -- OPINION OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED OCTOBER 24, 2003

Koerner v. The Garden District Association; 78 Fed. Appx. 960; 2003 U.S. App. LEXIS 21739 (5th Cir. 2003)

[*960] REYNALDO G. GARZA, Circuit Judge: n1

n1 Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

In this appeal we review the district court's decision to stay these proceedings pending the resolution of parallel state proceedings. For the following reasons, we affirm the district court's decision. **[*961]**

I.

FACTUAL AND PROCEDURAL BACKGROUND

In 1979, Plaintiff - Appellant, Louis R. Koerner, Jr. (hereinafter, "Koerner") purchased the property located at 1204 Jackson Avenue (hereinafter, "1204 Jackson") in the New Orleans' neighborhood known as the Garden District. 1204 Jackson is zoned for residential, non- commercial use, but Koerner uses the house as his law office. The New Orleans Comprehensive Zoning Ordinance states that a home may be used for an occupation, so long as (1) it is carried on by a member of the family residing on premises; (2) no person not a resident is employed; and (2) not more than 15% of the floor area of the dwelling is used for the occupation.

In 1979, the City of New Orleans (hereinafter, "City") cited Koerner for zoning violations at 1204 Jackson. The City alleged that Koerner was using in excess of 15% of the property for the operation of a law practice. In response, Koerner reduced the size of the office space to the 15% maximum.

In 1991, the City again investigated Koerner's use of 1204 Jackson for commercial purposes in violation of the applicable zoning regulations. This investigation was instigated by complaints by Defendants-Appellees, The Garden District Association and Michelle Landrieu (hereinafter, collectively "GDA"). This investigation determined that Koerner was in violation of the zoning ordinances by having non-resident workers employed at 1204 Jackson. The City ordered Koerner to stop his non-conforming use of the property.

In 1997, Koerner applied to the City for a permit to operate a bed and breakfast at 1204 Jackson. Koerner argued that he had acquired a right to a non-conforming use of the property for commercial purposes, based on the failure of the City to act against his violation of the zoning ordinance in regard to the non-resident employees. This application was denied by the City. Koerner appealed the decision to the administrative body established to review zoning issues, the City of New Orleans Board of Zoning Adjustment (hereinafter, "BZA"). The BZA affirmed the decision.

Koerner then filed suit in the Civil District Court for the Parish of Orleans, Civil Action No. 97-15968 (hereinafter, "CDC Zoning Action"), requesting a Writ of Certiorari, Mandamus and Declaratory Judgment, seeking to overturn the BZA's decision. In the CDC Zoning Action, Koerner named only the City of New Orleans as defendant; the GDA was not a party to that proceeding. The state trial court affirmed the BZA's determination. Koerner then appealed the trial court's decision to the Louisiana Fourth Circuit Court of Appeals, which also affirmed. Koerner's application for writ of certiorari was denied by the Louisiana Supreme Court.

Despite the clear holding of the BZA and a final judgment by the state court of appeals, Koerner continued to use 1204 Jackson for prohibited commercial purposes and even expanded the use of the property to include a bed and breakfast.

The City again investigated Koerner's use of his property after complaints from the GDA. During this investigation, City inspectors found that Koerner did not have an occupational license, which is required for attorneys practicing in the City. The City issued a citation for failure to have such a license.

Koerner's commercial use of his property also impacted the tax status of that property. After purchasing 1204 Jackson, Koerner married Jeanne Meade, who owned a house on the next block of Jackson Avenue. In 2000, Betty Jefferson, Assessor for the Fourth Municipal District of the City of New Orleans, investigated whether **[*962]** Koerner was entitled to a homestead exemption on 1204 Jackson. The GDA provided information to Jefferson as part of this investigation. Based on findings that Koerner operated a law office at 1204 Jackson, and that Meade and Koerner resided at 1314 Jackson Avenue, Jefferson determined that Koerner was not entitled to claim a homestead exemption for 1204 Jackson. Jefferson was initially a defendant in this proceeding, but all disputes between her and Koerner were resolved through a consent judgment.

In the present suit, Koerner alleges that the GDA encouraged the City to violate Koerner's civil rights. Koerner alleges that the City's issuance of a citation for his failure to obtain an occupational license and Jefferson's revocation of his homestead exemption for 1204 Jackson were influenced by the GDA.

In September of 2000, the GDA filed a motion to dismiss. The GDA asserted that the Koerner failed to state a cause of action because: (1) the GDA was not state a actor acting "under color of state law"; (2) any actions taken in petitioning the governmental bodies could not be the basis of any liability under the First Amendment pursuant to the Noerr-Pennington Doctrine; and (3) that the court should not exercise its supplemental jurisdiction over the state law claims.

On April 2, 2001, the GDA filed suit in the Civil

District Court for the Parish of Orleans in the matter styled as Garden District Association v. Louis R. Koerner, Jr., C.A. No. 2001-5737 (H)(12) (hereinafter, "GDA Enforcement Action"). The GDA sought an injunction to prohibit Koerner from continuing his use of 1204 Jackson in a manner that violated the Comprehensive Zoning Ordinance.

On December 17, 2001, the trial court granted the GDA's motion to dismiss, ruling that: (1) the GDA is a private actor, and does not act under color of state law; (2) the GDA may levy complaints to the appropriate City departments and officers, report violations and seek enforcement of the laws; (3) all such actions of contact between the GDA and the City are protected by the First Amendment under the Noerr-Pennington Doctrine; and (4) that the court would not exercise its supplemental jurisdiction over the state law claims.

Ignoring the findings of the trial court's ruling, Koerner then filed a motion for leave to file his first amended complaint. Koerner sought to reassert the previously dismissed claims against the GDA and to add new claims seeking injunctive or declaratory relief that he had obtained a non-conforming commercial use of the property. This motion was granted in part and denied in part. The court refused to allow the reassertion of claims against the GDA; however, the court did allow Koerner to add claims for injunctive or declaratory judgment.

On February 24, 2003, during the pretrial conference, the trial court (1) continued the trial without date and (2) requested that the GDA file a motion to stay the matter pending resolution of the GDA Enforcement Action pending in state court.

The GDA filed a motion to stay on February 28, 2003, asserting that the trial court should stay the matter pending resolution of the GDA Enforcement Action pursuant to the Burford Abstention Doctrine. The GDA argued that the issues remaining to be tried were dependant upon the determination

of the issue pending before the state court in the GDA Enforcement Action. On March 27, 2003, the trial court granted the motion to stay. This appeal followed.

II.
STANDARD OF REVIEW

[HN1] We review the district court's determination to abstain for abuse of discretion. **[*963]** *Lipscomb v. The Columbus Municipal Separate School District*, 145 F.3d 238, 242 (5th Cir. 1998).

III.
BURFORD ABSTENTION

The only remaining claims in this matter are: (1) alleged constitutional violations pertaining to the City's attempted enforcement of the Comprehensive Zoning Ordinance and the citation of Koerner for failing to have the requisite occupational law license; and (2) the City's defenses to those claims. The allegations made by Koerner depend on whether he has obtained a non-conforming use of 1204 Jackson, which is the issue presented in the parallel state proceeding.

Federal courts have a duty to exercise the jurisdiction conferred upon them by Congress and abstention is the exception not the rule. *Wilson v. Valley Electric Membership Corp.*, 8 F.3d 311 (5th Cir. 1993). However, a number of abstention doctrines have been recognized by the Supreme Court, including the doctrine recognized in *Burford v. Sun Oil Company*, 319 U.S. 315, 63 S. Ct. 1098, 87 L. Ed. 1424 (1943).

In applying *Burford* abstention, the court does not necessarily consider whether the cause of action is based on state or federal law, but instead looks at whether the plaintiff's claim is entangled in an area of state law that must be untangled before the federal case can proceed. *Sierra Club v. City of San Antonio*, 112 F.3d 789, 795 (5th Cir. 1997). Where

timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are difficult questions of state law bearing on policy problems of substantial import whose importance transcends the result in the case at bar; or (2) where the exercise of federal review of the questions in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a mater of substantial public concern. *St. Paul Ins. Co. v. Trejo*, 39 F.3d 585, 588 (5th Cir. 1994).

Five factors have been identified to consider in making this determination: (1) whether the cause of action arises under state or federal law; (2) whether the case requires inquiry into unsettled issues of state law or into local facts; (3) the importance of the state interest involved; (4) the state's need for a coherent policy in the area; and (5) the presence of a special state forum for judicial review. *Wilson*, 8 F.3d at 314. These factors support the trial court's determination to abstain in the current matter pending resolution of the parallel state proceeding.

Even though Koerner has framed his claims as arising under federal law, the underlying issues presented are purely state law issues. Koerner has alleged that the City's enforcement of the Comprehensive Zoning Ordinance and the Occupational Licensing law was wrongful. He has not alleged that these statutes are defective, only that their application to him is unconstitutional. Whether Koerner has established a non-conforming use of his property is purely a state law issue which should be decided in accordance with the adjudicatory process established to address zoning issues. The same is true of whether he has obtained an occupational license.

Further, the second, third, and fourth factors recognized by Wilson also favor abstention. Courts have recognized local land use and zoning as areas where local interest and coherent policy are necessary. *Pomponio v. Fauquier County Bd. of*

Supervisors, 21 F.3d 1319, 1327 (4th Cir. 1994), cert. denied, 513 U.S. 870, 115 S. Ct. 192, 130 L. Ed. 2d 125. The court in Pomponio **[*964]**stated that federal courts should not leave their indelible print on local and state land use and zoning law by entertaining these cases, and, in effect, sitting as a zoning board of appeals. Id.

Finally, the fifth *Wilson* factor is present in this case. The City of New Orleans, the Board of Zoning Adjustment, and the Louisiana state courts have provided Koerner a forum for his grievances. The City determined in 1997 that Koerner had not achieved a nonconforming commercial use of his property. Thereafter, Koerner appealed that determination to the Board of Zoning Adjustment, which affirmed the decision. Koerner then appealed that determination to the Civil District Court for the Parish of Orleans and the Louisiana Fourth Circuit Court of Appeals. The denial of his non-conforming use was upheld.

The GDA Enforcement Action, the parallel state proceeding, is an action to enforce the determination already made by the BZA, and the Louisiana state courts. Koerner is now seeking to have the federal courts once again determine whether he has obtained a non-conforming use of his property. The trial court properly rejected this attempt by abstaining to inject the federal courts into such local issues.

IV.
THE TRIAL COURT'S ORDER

Koerner argues that the trial court's order staying this matter was deficient because it did not contain an analysis of the Burford abstention doctrine. However, the order adopted the reasoning set forth by the GDA in its motion to stay by stating that it had received that motion and was granting it, finding that the issues presented in the state court proceeding were intertwined with the issues presented in this matter. The motion to stay was based solely on Burford abstention. Considering the facts of the case and the contents of motion to

stay, the trial court's order was sufficient.

V.
CONCLUSION

For the foregoing reasons, we affirm the district court's decision.

APPENDIX B – DENIAL OF PANEL AND EN BANC REHEARING – DECEMBER 16, 2003

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
NO. 03-30346

LOUIS R. KOERNER, JR. Plaintiff-Appellant

VERSUS

THE GARDEN DISTRICT ASSOCIATION; MICHELLE O. LANDRIEU, PAUL MAY; CITY OF NEW ORLEANS.
Defendants-Appellees

Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans

ON PETITION FOR REHEARING AND REHEARING EN BANC

(Opinion 10/24/03, 5 Cir.,_____ F.3d _____)

Before REYNALDO G. GARZA, DAVIS, and BARKSDALE, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED.R. APP.P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FED.R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also

DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

APPENDIX C – MINUTE ENTRY MARCH 26, 2003

FILED
U.S.DISTRICT COURT
EASTERN DISTRICT OF LA
2003 MAR 27 AM 9:13
LORETTA G.WHYTE
CLERK

MINUTE ENTRY AFRICK, J.
March 26, 2003

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

LOUIS R. KOERNER, JR.	CIVIL ACTION NO. 00-2206
VERSUS	
THE GARDEN DISTRICT ASSOCIATION, ET AL.	SECTION: "I" (3)

This Court is in receipt of defendants' motion to stay the above-captioned case pending a final decision with respect to state court issues that are intertwined with the issues presented to the Court in the above-captioned case. The motion to stay is **GRANTED. IT IS ORDERED** that the above-captioned case is administratively closed reserving the right to either party to file a written motion requesting that the above-captioned case be reopened within 30 days following the issuance of a final judgment by the state courts.

DATE OF ENTRY
MAR 27 2003

LANCE M. AFRICK
UNITED STATES DISTRICT JUDGE

APPENDIX D – ORDINANCES AND STATUTES

COMPREHENSIVE ZONING ORDINANCE OF THE CITY OF NEW ORLEANS

Section 4.8.1 Purpose of the District.

The RM-1 Multiple-Family Residential District is intended to maintain low-medium residential densities as might be appropriate for garden apartment developments in outlying areas, and, at the same time, to permit a variety of housing types. Population density and height of buildings are low enough to be generally compatible with single-family residential development in the same general neighborhood. Permitted community facilities are the same as for the single-family residential districts.

Section 4.8.3 Permitted Uses.

The following uses of land are authorized as permitted uses in the RM-1 Multiple-Family Residential District except that timeshare buildings and transient vacation rentals are prohibited:

1. Any permitted use authorized in the RS-1 Single-Family Residential District.

2. Two-family dwellings.* (See Section 11.33)

3. Town houses.* (See Section 11.33)

4. Multiple-family dwellings.

5. Homes for the aged, nursing homes, convalescent homes and orphans homes.

6. Convents and monasteries.

Section 4.1.3 Permitted Uses.

The following uses of land are authorized as permitted uses within the RS-1 Single-Family Residential District, except that timeshare buildings and transient vacation rentals are prohibited:

2. Home occupations, provided such use does not occupy more than fifteen (15) percent of the floor area of the dwelling unit.

99. Home Occupation. Any occupation within a dwelling and clearly incidental thereto, carried on by a member of the family residing on the premises provided that no person not a resident of the premises is employed, that not more than fifteen (15) percent of the floor area of the dwelling is used for the home occupation, and no stock in trade is kept or commodities sold, no mechanical equipment is used except such that is normally used for family, domestic, or household purposes, and there is no exterior indication other than a sign permitted by the district regulations, that the building is being used for any purpose other than a dwelling. When within the above requirements, a home occupation includes but is not limited to the following: (a) art studio; (b) dressmaking; (c) professional office of a lawyer, engineer, architect, accountant, salesman, real estate agent, insurance agent, or other similar occupations; (d) teaching, with musical instruction limited to not more than two (2) pupils at a time; however, a home occupation shall not be interpreted to include barber shops, beauty parlors, restaurants, or office of a physician or dentist where mechanical equipment is used.

LOUISIANA REVISED STATUTES

LSA-R.S. 9:5625. Violation of zoning restriction, building restriction, or subdivision regulation

A.(1) **All actions civil or criminal**, created by statute, ordinance, or otherwise, except those actions created for the purpose of amortization of nonconforming signs and billboards

enacted in conformity with the provisions of R.S. 33:4722, **which may be brought** by parishes, municipalities, or their instrumentalities or by any person, firm, or corporation **to require enforcement of and compliance with any zoning restriction**, building restriction, or subdivision regulation, imposed by any parish, municipality, or an instrumentality thereof, and based upon the violation by any person, firm, or corporation of such restriction or regulation, **must be brought within five years from the first act constituting the commission of the violation.**[7]

(2) Where a violation has existed for a period of two years prior to August 1, 1956, except those actions created for the purpose of amortization of nonconforming signs and billboards enacted in conformity with the provisions of R.S. 33:4722, the action must be brought within one year from and after August 1, 1956.

(3) With reference to violations of use regulations all such actions, civil or criminal, except those actions created for the purpose of amortization of nonconforming signs and billboards in conformity with the provisions of R.S. 33:4722, must be brought within five years from the date the parish, municipality, and the properly authorized instrumentality or agency thereof if such agency has been designated, first had been actually notified in writing of such violation.

(4) Except as relates to nonconforming signs and billboards, any prescription heretofore accrued by the passage of two years shall not be interrupted, disturbed, or lost by operation of the provisions of this Section.

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[7] This was amended effective July of 1997 to extend the period from two years to five years, but to protect any non-conforming use that had already accrued under the two-year prescriptive period.

(2)

1331

No. 03-~~0331~~

Supreme Court, U.S.
FILED
APR 19 2004
OFFICE OF THE CLERK

In the

Supreme Court of the United States

LOUIS R KOERNER, JR.

Petitioner

VERSUS

THE GARDEN DISTRICT ASSOCIATION, MICHELLE O. LANDRIEU, PAUL MAY AND THE CITY OF NEW ORLEANS

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Fifth Circuit Court of Appeals was correct in affirming the Louisiana Eastern District Court's decision to grant the Garden District Association's motion to stay the federal proceedings pending the resolution of the ***same issue*** in the ongoing state court proceedings.

2. Whether application of the *Burford* abstention doctrine by the Eastern District Court was an abuse of that court's discretion.

3. Whether the district court's ruling was fatally deficient and, therefore, constituted legal error because it merely stated that the federal suit was intertwined with state court issues without specifically referencing the *Burford* doctrine by name.

STATEMENT OF THE CASE

Louis Koerner, applicant, is an attorney practicing law out of his home at 1204 Jackson Avenue in the historic Garden District neighborhood of New Orleans. The Garden District is zoned for non-commercial, residential use – "RM-1" – Multiple Family Residential District – under the provisions of the Comprehensive Zoning Ordinance ("CZO") of the City of New Orleans ("City"). RM-1 provides that a home may be used for an occupation as long as: (1) it is engaged in by a family member who resides on the premises, (2) no non-resident is employed therein, and (3) no more than 15% of the floor area is used for the occupation.

The City received complaints against Koerner of zoning violations in 1979 and 1991. The first complaint concerned his alleged use of excess square footage for the home office; in response, Koerner reduced the office space to 15%. The 1991 violation involved the employment of non-residents and resulted in the City ordering Koerner to cease and desist his non-conforming use of the property. The City, however, took no further action to follow through with the violation.

In 1997, Koerner applied for a permit to establish a bed and breakfast in his house. He asserted that he had acquired a right to a non-conforming use of the property for commercial purposes because the City had failed to act against his violation of employing non-residents. The GDA opposed his application. The application was denied by the City of New Orleans, Department of Safety and Permits. Koerner appealed to the administrative body authorized to review zoning issues, the Board of Zoning Adjustment ("BZA"), which Board unanimously affirmed the denial.

Koerner then appealed to the state district court, where the BZA's decision was affirmed based on these factors: (1) BZA decisions are afforded the presumption of validity; (2) the usage of a residence for a law office is a *permitted use*; and (3)

the BZA had a reasonable basis for concluding that *no non-conforming commercial use had been acquired. See Koerner v. City of New Orleans*, 98-916 (La. App. 4 Cir. 1/9/99), 726 So. 2d 435, 437 (reciting the reasoning of the civil district court). Koerner appealed to the Louisiana Fourth Circuit Court of Appeal, which also affirmed. *Id.* at 438.

The state appellate court reviewed the matter on the sole issue of whether the BZA followed due process in making its determination that applicant's residence had not acquired a non-conforming use status. The appellate court examined the requirement of La. Rev. Stat. 9:5625(A) that, to prescribe a zoning violation, an action concerning the "use" violation must be brought within two years from the date the municipality received written notice of the violation. The Fourth Circuit concluded that the BZA was reasonable in finding that Koerner's law office constituted a permitted use of his residence, and that the City never received the requisite written notice of a use violation for commencement of the prescriptive period. Koerner had notified the City of his employment of 3-5 non-resident employees and the City failed to enforce the resident restriction; therefore, that use violation prescribed and the court found that he is now permitted to employ non-residents in his home law practice. Nonetheless, the court determined that such use violation did not establish a non-conforming commercial use of the *entire residence*, and the Fourth Circuit affirmed the judgment of the district court. *Koerner v. City of New Orleans,* 98-0916 (La. App. 4 Cir. 1/9/99), 726 So. 2d 435, 438. The Louisiana Supreme Court denied Koerner's application for certiorari. *See* 99-0560 (La. 4/23/99), 742 So. 2d 883.

Despite the finality of the decision in the state courts that he was not exempt from the zoning regulations, Koerner continued to use the residence for commercial purposes in violation of the applicable zoning regulation. Complaints continued, and at least some of them came to the City's

attention via the GDA.

The City filed a Motion for Contempt against Koerner for his continued violation of the CZO regulations, but this motion was dismissed by order dated March 20, 2000 on procedural grounds; apparently, although the court had determined that Koerner had not acquired a right to use his property in the manner that he was employing, the City had failed to request an order expressly forbidding Koerner to use it in that manner. Thus, Koerner continue the commercial use of the property and, in April 2001, the GDA filed suit in Civil District Court seeking an injunction against Koerner's continued use of the residence in violation of the zoning ordinance. Koerner responded with exceptions, including prescription and *res judicata.* The exceptions were heard in 2003.

Apparently, Koerner also expanded the prohibited use to include a bed and breakfast. The City again investigated after complaints from the GDA and, during that investigation, found that Koerner did not have an occupational license, which is required for attorneys who practice in the City. Accordingly, the City issued a citation for failure to have the license.

Additionally, during this general time period, Koerner married a woman who lived in the next block and moved in with her. He continued to use his home for the law practice, but the Assessor for the Fourth Municipal District, Betty Jefferson, investigated whether Koerner was entitled to a homestead exemption on his residence since he no longer resided there. The GDA provided some information to Jefferson in the investigation. After the homestead exemption was revoked, Jefferson was added as a defendant in the instant suit, but later she was dismissed after resolution via consent judgment.

Koerner filed a 42 U.S.C. § 1983 action in federal district court on July 26, 2000 alleging that the City, the zoning administrator, the assessor, and the GDA had denied him equal

protection and violated other constitutional rights. Koerner claimed that the City's issuance of a citation for his lack of occupational license and Jefferson's revocation of his homestead exemption were influenced by the GDA.

The GDA was dismissed from the federal suit on December 17, 2001. Koerner filed a motion for leave to amend his complaint in June 2002, seeking to reassert the previously dismissed claims against the GDA and to add new claims and parties and seeking injunctive relief or declaratory judgment establishing that he had obtained a non-conforming use of his residence. On December 23, 2002, the motion was granted in part (allowing Koerner to file amended claims against the City) and denied in part (*i.e.*, not allowing the proposed claims to be asserted against the GDA or Landrieu, and precluding Koerner from naming the GDA Security District ("GDSD") and the insurers of the GDA and GDSD as defendants).

On January 6, 2003, Koerner filed his First Amended Complaint and Jury Demand asserting the same allegations against the City and Paul May (zoning administrator). In the Prayer for Relief, Koerner for the first time sought injunctive relief declaring that the enforcement of the zoning ordinance against his use of the property is barred by prescrition and *res judicata.* These identical issues were pending before the state Civil District Court in connection with the exceptions filed by Koerner in the state suit.

On February 24, 2003, at the pre-trial conference, the federal district court continued the trial without date and asked the GDA to file a motion to stay the matter pending resolution of the GDA Enforcement Action in state court. The requested motion and supporting memorandum were filed on February 28, 2003 asserting that the district court should stay the matter pursuant to the Burford Abstention Doctrine. *See* Appendix B., attached herein. The GDA argued that the issues remaining to be tried were dependent upon the determination of the same issue in the state court proceeding ("[T]he claims asserted

against the City of New Orleans are dependant upon whether Koerner has established a non-conforming use of his Property.") and that pursuant to the *Burford* abstention doctrine, and interpretive jurisprudence, the proper course of action for the federal district court would be to stay the matter pending resolution of the same issue in state court; *i.e.*, whether Koerner had acquired a non-conforming, commercial use of his Garden District residence. *See* Appendix B, Motion to Stay the federal suit and Memorandum in Support, attached herein.

On March 26, 2003, the district court granted the motion to stay by way of a one-paragraph Order reflected in the Minute Entry filed on March 27, 2003, stating in pertinent part: "This Court is in receipt of defendants' motion to stay the above-captioned case pending a final decision with respect to state court issues that are intertwined with the issues presented to the Court in the above-captioned case." *See* Appendix C in Koerner's Application.

Applicant appealed that decision to the United States Fifth Circuit, which affirmed the Louisiana Eastern District court's decision to stay. *See* Appendix A, attached herein. This writ application ensued.

LAW AND ARGUMENT

I. THE FIFTH CIRCUIT CORRECTLY REVIEWED THE DISTRICT COURT'S DECISION

Koerner argued that the Fifth Circuit should review the district court's decision *de novo* and, in this writ application, he asserts that appellate court erred by failing to conduct such a review. *See* Application, at 4(A). Moreover, Koerner contends that the Fifth Circuit's affirmance of the district court's stay order constitutes a conflict in the federal circuit courts of appeals. *See* Application, at 10-11, 17. Koerner is incorrect.

First, as the federal Fifth Circuit explained, the appropriate standard of appellate review of the district court's ***determination*** to abstain is abuse of discretion. *See Lipscomb v. The Columbus Municipal Separate School District*, 145 F.3d 238, 242 (5th Cir. 1998); *Wilson v. Valley Elec. Membership Corp.*, 8 F.3d 311, 313 (5th Cir. 1993); *American Bank and Trust Co. of Opelousas v. Dent,* 982 F.2d 917, 922 n.6 (5th Cir. 1993). *See also International College of Surgeons v. City of Chicago*, 153 F.3d 356, 360 (7th Cir. 1996); *Fireman's Fund Ins. Co. v. Quackenbush,* 87 F.3d 290, 294 (9th Cir. 1996).

Perhaps the question of whether a *de novo* review is required to determine the ***legal sufficiency*** of the requirements for abstention comes down to semantics. The Fifth Circuit conducted its own *de novo* review of the requirements for abstention and stated accurately that: "We review ***the district court's determination*** to abstain for abuse of discretion." *Koerner v. The Garden District Ass'n,* 78 Fed. Appx. 960, 962 (5th Cir. 2003) (emphasis added) [the cited case is unpublished in the Federal Reporter; pursuant to Fifth Circuit Rule 47.5.4, a copy of the opinion is, therefore, attached to this writ opposition.]. Koerner even quotes that same language in his application, *see* Application, at pages 16-17, citing *United States v. Morros,* 268 F.3d 695 (9th Cir. 2001) and *City of*

Tuscon v. U. S. West Communications, Inc., 284 F.3d 1128 (9th Cir. 2002). The only word that is different in the cited cases from the language quoted above from the Fifth Circuit is the reference to "decision" instead of "determination." Surely, this is an insignificant distinction. The Fifth Circuit performed the correct review – abuse of discretion – of the district court's decision or determination.

Moreover, when the federal district court reviewed the BZA's decision upholding the City's denial of Koerner's requested permit for operation of a bed and breakfast in a neighborhood zoned only for residential use, the court also correctly employed a limited review because a presumption of validity attaches to BZA decisions. *See Elysian Fields, Inc. v. St. Martin*, 600 So. 2d 69 (La. App. 4th Cir. 1992). A reviewing court should not merely substitute its own judgment for that of the BZA unless there is a showing that the Board was arbitrary and capricious or abused its discretion. *Buuck v. Board of Zoning Adjustments, Department of Safety and Permits, City of New Orleans*, 537 So. 2d 244 (La. App. 4th Cir. 1988); *Lakeshore Property Owners Association v. City of New Orleans, Zoning Board of Appeal and Adjustments*, 481 So. 2d 162 (La. App. 4th Cir. 1985). In determining whether the BZA's decision was irrational or clearly erroneous, the trial court is limited in scope to a review of the administrative record. *Hanson v. Louisiana State Racing Comm'n*, 436 So. 2d 1308 (La. App. 4th Cir. 1983).

II. THE FEDERAL COURT'S ABSTENTION WAS CORRECT BECAUSE THE PRESENCE OF LOCAL CONCERNS OUTWEIGHS THE PROPRIETY OF FEDERAL INTERFERENCE

Koerner argues that the Fifth Circuit "correctly referenced the *Burford* requirements but applied them incorrectly." *See* Application, at 11. Additionally, Koerner

asserts that his case does not involve any difficult questions of state law, nor would the exercise of federal jurisdiction be disruptive to the state's efforts to establish a coherent policy concerning a matter of substantial public interest.[1] Koerner's arguments are unavailing, as demonstrated below.

Abstention doctrines are not exceptions to federal courts' jurisdiction, but rather are judicially-created guidelines that define circumstances in which federal courts may decline to exercise jurisdiction. *See New Orleans Public Service, Inc. v. Council of the City of New Orleans,* 491 U.S. 350, 358-60 (1989); *American Bank and Trust Co. of Opelousas v. Dent,* 982 F.2d 917, 922 (5th Cir. 1993). Although this Court has recently emphasized the federal courts' duty to exercise the jurisdiction conferred upon them by Congress, *see Quackenbush v. Allstate Ins. Co.,* 517 U.S. 706, 716 (1996), it has also upheld abstention from that exercise under certain circumstances. One of the few bases for such abstention is the *Burford* doctrine,[2] derived from *Burford v. Sun Oil Co.,* 319 U.S. 315 (1943), where this Court found that the Texas state court could "give fully as great relief . . ." and that "[d]elay, misunderstanding of local law, and needless federal conflict with state police are the inevitable product of this double system of review." *Id.* at 327.

This Court more recently has instructed that the

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[1] These are the two factors that courts should find when determining whether the *Burford* abstention should be applied. *See St. Paul Ins. Co. v. Trejo,* 39 F.3d 585, 588 (5th Cir. 1994).

[2] Other types of abstention doctrines include the *Pullman* abstention, the oldest of the abstention doctrines, which may be invoked where there is an unsettled question of state law, where the resolution would affect the decision of a federal constitutional issue, *see Railroad Comm'n of Texas v. Pullman Co.,* 312 U.S. 496 (1941), the *Younger* abstention (pertaining to restraining state criminal prosecutions), and the *Colorado River* abstention (avoiding piecemeal litigation), *Colorado River Water Conservation District v. United States,* 424 U.S. 800 (1976).

Burford doctrine is appropriately invoked in two instances:

> Where ***timely and adequate state-court review is available***, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies:(1) when there are "difficult questions of state law bearing on policy problems of substantial public import . . ." ; or (2) where the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."

New Orleans Public Service, 491 U.S. at 361. This Court has further explained the doctrine as evidencing a concern "with protecting complex state administrative processes from undue federal interference . . . ." *Id.* at 362.

Such articulated concerns are presented squarely in the case *sub judice*: the City's zoning regulations are complex and comprise strictly state (*i.e.,* local), not federal, concerns. The federal court cannot and should interfere with the local zoning determinations made by the administrative agency charged with reviewing the City's implementation of its zoning rules, especially given the importance of preserving the historic character of the Garden District neighborhood in one of New Orleans' oldest and most historically-significant neighborhoods.

In certain types of cases in which a plaintiff has simultaneously sought federal relief, in addition to litigating in the state court, the ***application of the Burford abstention by the federal court is the general rule***:

> In cases in which plaintiffs' federal claims stem solely from construction of state or local land use or zoning law, not involving the constitutional validity of the same and absent

> exceptional circumstances . . ., the [federal] district courts should abstain under the *Burford* doctrine to avoid interference with the State's or locality's land use policy.

Pomponio v. Fauquier County Board of Supervisors, 21 F.3d 1319 (4th Cir. 1994), *implicitly overruled on other grounds, Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996).[3] The Fourth Circuit recently acknowledged the refinement of the *Burford* abstention by this Court and noted: "Since our decision in *Pomponio,* however, the Supreme Court has declared that dismissal, based on abstention principles, is appropriate only where the relief sought is equitable or otherwise discretionary. In damages actions, a federal court cannot dismiss the action but can enter a stay to await the conclusion of state proceedings." *Front Royal and Warren County Industrial Park Corp. v. Town of Front Royal, Virginia,* 135 F.3d 275, 282 (4th Cir. 1998). As the instant facts reflect, the Louisiana Eastern District court followed the proper procedure, for the proper reasons, in its decision to apply the *Burford* abstention under the circumstances presented.

In support of his contention that abstention is inappropriate, Koerner first relies upon *Heritage Farms, Inc. v. Solebury Township,* 671 F.2d 743 (3d Cir. 1982), where the

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3 *Pomponio* involved a § 1983 due process claim by a land developer who alleged that county officials and agencies had improperly withheld necessary zoning approvals in an effort to thwart his plans to build a subdivision on land he owned. The Fourth Circuit approved the district court's *dismissal* of the federal suit in that case, but this Court later held that in cases involving a claim for damages, the district court was in error to dismiss the federal proceedings. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 728-31. The correction in *Quackenbush*, however, does not affect the reasoning in *Pomponio* that federal courts should abstain under *Burford* from adjudicating actions involving questions of zoning and land use, but merely establishes that the *proper procedural vehicle* for such abstention in an action for damages is to *stay, as opposed to dismiss*, the federal suit, which was the procedural action taken in the instant case.

court, in concluding that the *Burford* abstention did not apply, found that the "mere presence of land use issues should not trigger a mechanical decision to abstain" when the facts of the case indicate the presence of "an unlawful conspiracy." *Id.* at 748. Koerner suggests that his situation of the home office non-conforming use problem, coupled with what he contends are wrongful civil and criminal proceedings and his suffering of defamation damages, among other problems, makes the *Heritage Farms* applicable and compels the same result: no abstention by the federal courts.

Heritage Farms, however, is not applicable to the instant case because, first, the notion of a conspiracy existing against Koerner is ludicrous. As the factual record reflects, Koerner has repeatedly violated the zoning restrictions by disregarding the limitations on his operation of the home office in his residentially-zoned neighborhood. If Koerner wanted to expand his law practice, he could have moved it into a suitable, commercially-zoned site instead of attempting to foil the City's restrictions and then accusing the neighborhood association and the City, among other public officials, of conspiring against him. *Heritage Farms* is also distinguishable because the facts in that case indicated the presence of actual attempts to ruin the plaintiff's real estate business and his credit rating. Individual defendants stated their dislike of the plaintiff and their attempts to "bankrupt" him and "put him out of business." *Heritage Farms,* 671 F.2d at 745. Those same facts are not present in the instant case. The complaints against Koerner were undisputably valid.

Moreover, the court in *Heritage Farms* stated: "Here, as in Colorado River Water Conservation, ***'no questions bearing on state policy are presented for decision.*** Nor will decision of the state claims impair efforts to implement state policy as in Burford.'" *Heritage Farms*, 671 F.2d at 747-48 (quoting *Colorado River Water Conservation District v. United States*, 424 U. S. 800, 814 (1976)) (emphasis added). As stated

above, the issues of ***zoning regulation in the Garden District of New Orleans absolutely implicates state, as opposed to federal, policy***. As such, it was correct under the *Burford* doctrine for the district court to grant the GDA's motion to stay the federal proceedings pending the outcome of the state court litigation.

Koerner also relies upon *New Orleans Public Service, Inc. v. Council of the City of New Orleans,* 491 U.S. 350 (1989) where this Court examined when the *Burford* doctrine should be utilized and cautioned that "the mere presence of complex state administrative processes does not necessarily require abstention, even where there exists a potential for conflict between federal and state law." *Id.* at 361. Koerner misconstrues the significance *New Orleans Public Service* to the instant case, however. In fact, there exists in the present case much more than merely the "***potential for conflict between federal and state law***." In fact, the issue of whether or not Koerner has acquired a non-conforming, commercial use of his Garden District home is ***only determined by state law.*** No federal law is involved in that determination, which the Fifth Circuit stated is the central issue to be determined in both the state and the federal proceedings: "The allegations made by Koerner depend on whether he has obtained a non-conforming use of 1204 Jackson, which is the issue presented in the parallel state proceeding." *Koerner v. The Garden District Association,* 78 Fed. Appx. 960, 963 (5th Cir. 2003).

In further support of his contention that no difficult areas of state law exist and federal jurisdiction would not be disruptive to state concerns, Koerner also cites *Neufeld v. The City of Baltimore,* 964 F.2d 347 (4th Cir. 1992) and *Izzo v. Borough of River Edge,* 843 F.2d 765 (3d Cir. 1988). The Fourth Circuit reversed the decision to abstain, explaining that the exercise of federal jurisdiction was proper in a case of zoning violation based on satellite dish installation because there was not a difficult question of state law or federal

impingement of same. *Neufeld*, 964 F.2d at 349. That court concluded: "The district court did not have before it a case involving difficult questions of state law involving peculiarly local concerns." *Id.* at 350. Additionally, the court held that applying the *Burford* abstention in that case was improper because the suit ***"involve[d] local land issues only in a peripheral sense"*** and ***did not require interpretation of state laws "of peculiar concern" to the city***. *Id.* at 351 (emphasis added).

In contrast to *Neufeld,* however, the instant case involves local land (*i.e.*, zoning) issues in a central and primary sense; zoning is in no way peripherally related to the instant litigation, but rather the suit presents peculiarly local concerns involving New Orleans' zoning regulation. Koerner's claims of improper regulation by the City would be difficult to disentangle without having the clearest understanding of the zoning laws. Plus, as stated above, the decisions of the BZA are afforded the highest level of validity and unless the reviewing district court finds the decisions were made arbitrarily or lacking in due process, the BZA decisions are not to be disturbed. Additionally, the state courts have already reviewed and affirmed the BZA's determination that the denial of the permit for a bed and breakfast (commercial) use of Koerner's property was correct. Koerner has failed, once again, to follow the dictates of the state courts, and now, in a transparent attempt, seeks to undermine the state courts' authority by filing this spurious attack on the City. The current litigation initiated by the GDA ***to enforce the judgment it has already obtained in its favor, i.e., to prohibit Koerner from continuing to disregard the zoning restrictions on his property,*** should proceed to conclusion without interference by the federal courts. That is, evidently, the reason why the federal district court requested the GDA to file a motion to stay the federal proceedings pending the resolution of the state court litigation. Such a decision to stay the federal proceedings was

correctly upheld by the Fifth Circuit and any further attempts by Koerner to undermine that decision should be denied by this Honorable Court.

Similarly, in *Izzo*, the Third Circuit based its reversal of the district court's abstention due to land use issues on its determination that the land use regulation at issue in that case was not as complex as the one in *Burford*; the regulation was not so technical that the federal court would become enmeshed in a state law matter of relatively minor federal concern, nor would the federal court's decision have any type of far-reaching effect in the state arena of land use regulation. *Izzo*, 843 F.2d at 769. In fact, the appellate court explained: ***"If only state law applies, Burford abstention carries more weight than when federal interests require evaluation as well."*** *Id.* at 768 (emphasis added). As previously discussed, only state law is implicated in both the state and federal suits at issue. Thus, the grant of GDA's motion for stay of the federal proceedings was justified.

Koerner also cites for support *Kern-Tulare Water District v. City of Bakersfield*, 828 F.2d 514 (9th Cir. 1987), in which the court held that a federal ruling involving state water and water rights policy was not disruptive of state efforts to establish coherent policy in that area. What Koerner fails to appreciate in relying upon *Kern-Tulare* for support is that the federal issues involved antitrust claims, while the state area of law concerned water regulation. As the Ninth Circuit stated: "That result [from federal adjudication of the antitrust issues] does not affect in the slightest California's ability to take acts necessary to regulate water and water rights . . . ." *Id.* at 518. The instant case involves ***the same issue in both state and federal court, which issue is strictly a local one of major concern: restrictions on commercial zoning in a historic district of New Orleans, which are zealously protected by the residents and neighborhood association from unauthorized commercial use.***

As the Fifth Circuit explained: "Whether Koerner has established a non-conforming use of his property is ***purely a state law issue*** which should be decided in accordance with the adjudicatory process established to address zoning issues. The same is true of whether he has obtained an occupational license." *Koerner v. The Garden District Association*, 78 Fed. Appx. at 963 (emphasis added). Moreover, the appellate court concluded that:

> The GDA Enforcement Action, the parallel state proceeding, is an action to enforce the determination already made by the BZA, and the Louisiana state courts. Koerner is now seeking to have the federal courts once again determine whether he has obtained a non-conforming use of his property. The trial court properly rejected this attempt by abstaining to inject the federal courts into such local issues.

Koerner, 78 Fed. Appx. at 964.

Koerner's assertions are incorrect for two primary reasons. First, the *Burford* doctrine does not require the area of state law to be as complex as rocket science, but rather for the federal court to abstain under the circumstances outlined because "it is in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the ***rightful independence of state governments in carrying out their domestic policy***." *Burford*, 319 U.S. at 318 (emphasis added). Zoning regulations constitute a sufficiently local, complex, and important public interest issue that decisions involving its implementation should be decided by state, as opposed to federal, courts. And, in this case, such a decision already has been made by the state courts; despite the finality of such state determinations, however, Koerner continues his efforts to disregard them by now trying to entangle the federal courts in the skirmish.

Second, the *Burford* doctrine requires the availability of

"timely and adequate state-court review" for consideration of the federal plaintiff's rights. *New Orleans Public Service, Inc. v. Council of the City of New Orleans,* 491 U.S. 350, 361 (1989). Koerner argues that the second type of *Burford* abstention – presence of a special state forum for the claims to be litigated – is lacking in his situation. He contends that the BZA is not such a special forum and that other claims besides the non-conforming use issues were never litigated. *See* Application, at 15. Koerner's arguments lack a sound basis; the same arguments have been advanced and lost by other litigants in very similar circumstances.

For example, in *MacDonald v. Village of Northport, Michigan,* 164 F.3d 964 (6th Cir. 1999), the court explained the plaintiffs' contentions as follows: "The MacDonalds argue that abstention was improper because Michigan has not created a specialized forum for deciding this kind of case. The State of Michigan and the Village of Northport counter that abstention was necessary because issues of land use and zoning are purely local disputes and there are no federal questions." *Id.* at 967. The Sixth Circuit reviewed this Court's instructions enunciated in *New Orleans Public Service* (referred to in some opinions as "*NOPSI*") language quoted above herein at pages 7-8 and noted that "Michigan has established a policy and has consolidated judicial review of these cases in the local forums best suited to adjudicate the local issues and facts raised in such cases." *MacDonald,* 164 F.3d at 968. The court concluded that federal review of the zoning question at issue before it would have disrupted the state's efforts for cohesion, as cautioned by this Court in *NOPSI.* Finally, the appellate court applied the reasoning utilized in *Pomponio* ("Although *Pomponio* was partially overruled on other grounds, its analysis remains sound." *MacDonald,* 164 F.3d at 969) and held: "Because there was timely and adequate state court review available to the MacDonalds, and because federal review of the question in this case would disrupt 'state efforts to establish a coherent policy

with respect to a matter of substantial public concern,' *NOPSI*, 491 U.S. at 361, . . . we hold that the district court properly abstained from deciding this case." *MacDonald,* 164 F.3d at 970. The same reasoning applies in the case *sub judice.*

The legislatively-created, comprehensive zoning laws authorize the BZA to review any zoning decisions made by the City, which review was performed and affirmed by the BZA in the case. Additionally, as in *MacDonald*, an aggrieved applicant can seek additional review by state courts, which Koerner pursued in this matter. The Civil District Court of Orleans Parish affirmed the BZA's decision, and the state Fourth Circuit Court of Appeal affirmed the trial court. The Louisiana Supreme Court denied writs; thus, ***the state litigation is over***. Koerner is simply dissatisfied with the result, but his attempt to seek recourse in the federal judicial system should not be allowed, as it was disallowed by the Sixth Circuit.

As the Fourth Circuit explained in *Pomponio,* federal courts should not interfere with local and state land use and zoning law by entertaining cases such as the instant one, which in effect asks the federal forum to sit as a zoning board of appeals. The court stated: "Therefore, we believe that in the usual [zoning] case, federal courts should not leave their indelible print on local and state land use and zoning law by entertaining these cases and, in effect, sitting as a zoning board of appeals, as Justice Marshall so aptly put it in *Village of Belle Terre*, 416 U.S. [1], at 13 [(1974)] . . . ." *Id.* at 1327.

As discussed, therefore, the cases cited by Koerner in support of his assertions are distinguishable from the instant case in vital ways. *Pomponio* and *MacDonald* are the cases more analogous to the situation presented in this writ application and, for the reasons asserted by the City above, the City respectfully requests this Court to deny Koerner's application because the federal district court was correct in ordering the stay pending resolution of the identical, determinative issue in the state court proceedings, where the

issue at stake is a matter of strong, local policy and public concern of the citizens of New Orleans.

III. THE FEDERAL DISTRICT COURT'S ORDER WAS SUFFICIENTLY SPECIFIC BECAUSE IT REQUESTED THE MOTION TO STAY BY THE GDA AND ADOPTED THE *BURFORD* DOCTRINE ASSERTED IN THE MOTION

Koerner argues that the district court's order staying the instant matter was defective because it failed to articulate the *Burford* doctrine or provide analysis for abstention. As the Fifth Circuit explained in detail, the order from the district court adopted the reasoning proposed by the GDA in its motion to stay. The district court stated that the issues in both state the federal proceedings were intertwined. The motion to stay was based only on the *Burford* abstention doctrine. *See* Appendix B, Motion to Stay and Memorandum in Support.

The appellate court considered the facts presented in the record and the contents of the motion to stay, which motion was requested from the GDA by the district court. The Fifth Circuit concluded: "[T]he trial court's order was sufficient." *Koerner v. The Garden District Association,* 78 Fed. Appx. at 964. That decision should be overturned unless this Court determines that it abused its discretion in making that determination.

IV. CONCLUSION

Koerner is incorrect in his asserted reasons to persuade this Court to grant his writ application for certiorari: no conflict is created among the federal circuit courts of appeals by the Fifth Circuit's decision in this matter, which affirmed the district court's order granting the GDA's motion to stay the federal proceedings pending the outcome of the state litigation on the same issue. The Fifth Circuit decided not to publish the decision in the Federal Reporter because it does not contain any of the publication criteria listed in Fifth Circuit Rule 47.5.1; *e.g.*, establishing a new rule of law; altering or modifying an existing rule of law; creating or resolving a conflict of authority within the circuit or with another circuit, etc. Hence, apparently the appellate court did not consider that any new, or conflicting precedent was articulated by its holding.

The Fifth Circuit correctly analyzed this case, and concluded that the decision of the district court to abstain during the pendency of the state court proceedings was proper. For the reasons discussed above, the decision of the Fifth Circuit should stand and the City respectfully requests this Honorable Court to deny the instant application.

Respectfully submitted,

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APPENDIX A
UNPUBLISHED OPINION OF
THE 5TH CIRCUIT COURT OF APPEALS

United States Court of Appeals,
Fifth Circuit.

Louis R. KOERNER, Jr. Plaintiff--Appellant,
v.
The GARDEN DISTRICT ASSOCIATION; Michelle O. Landrieu; Paul May; City of New Orleans Defendants--Appellees.
No. 03-30346
Summary Calendar.
Oct. 24, 2003.

Appeal from the United States District Court for the Eastern District of Louisiana. (00-CV-2206-I).
Louis R. Koerner, Jr., pro se, Law Offices of Louis R. Koerner, New Orleans, LA, for Plaintiff-Appellant.
David J. Krebs, Thomas M. Beh, Krebs, Farley & Pelleteri, New Orleans, LA, for Defendants-Appellees.

Before REYNALDO G. GARZA, DAVIS, and BARKSDALE, Circuit Judges.

REYNALDO G. GARZA, Circuit Judge.[1]

In this appeal we review the district court's decision to stay these proceedings pending the resolution of parallel state proceedings. For the following reasons, we affirm the district court's decision.

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[1] Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

I.
FACTUAL AND PROCEDURAL BACKGROUND

In 1979, Plaintiff--Appellant, Louis R. Koerner, Jr. (hereinafter, "Koerner") purchased the property located at 1204 Jackson Avenue (hereinafter, "1204 Jackson") in the New Orleans' neighborhood known as the Garden District. 1204 Jackson is zoned for residential, non-commercial use, but Koerner uses the house as his law office. The New Orleans Comprehensive Zoning Ordinance states that a home may be used for an occupation, so long as (1) it is carried on by a member of the family residing on premises; (2) no person not a resident is employed; and (2) not more than 15% of the floor area of the dwelling is used for the occupation.

In 1979, the City of New Orleans (hereinafter, "City") cited Koerner for zoning violations at 1204 Jackson. The City alleged that Koerner was using in excess of 15% of the property for the operation of a law practice. In response, Koerner reduced the size of the office space to the 15% maximum.

In 1991, the City again investigated Koerner's use of 1204 Jackson for commercial purposes in violation of the applicable zoning regulations. This investigation was instigated by complaints by Defendants-Appellees, The Garden District Association and Michelle Landrieu (hereinafter, collectively "GDA"). This investigation determined that Koerner was in violation of the zoning ordinances by having non-resident workers employed at 1204 Jackson. The City ordered Koerner to stop his non-conforming use of the property.

In 1997, Koerner applied to the City for a permit to operate a bed and breakfast at 1204 Jackson. Koerner argued that he had acquired a right to a non-conforming use of the property for commercial purposes, based on the failure of the City to act against his violation of the zoning ordinance in regard to the non-resident employees. This application was denied by the City. Koerner appealed the decision to the administrative body established to review zoning issues, the City of New Orleans Board of Zoning Adjustment (hereinafter, "BZA"). The BZA affirmed the decision.

Koerner then filed suit in the Civil District Court for the Parish of Orleans, Civil Action No. 97-15968 (hereinafter, "CDC Zoning Action"), requesting a Writ of Certiorari, Mandamus and Declaratory Judgment, seeking to overturn the BZA's decision. In

the CDC Zoning Action, Koerner named only the City of New Orleans as defendant; the GDA was not a party to that proceeding. The state trial court affirmed the BZA's determination. Koerner then appealed the trial court's decision to the Louisiana Fourth Circuit Court of Appeals, which also affirmed. Koerner's application for writ of certiorari was denied by the Louisiana Supreme Court.

Despite the clear holding of the BZA and a final judgment by the state court of appeals, Koerner continued to use 1204 Jackson for prohibited commercial purposes and even expanded the use of the property to include a bed and breakfast.

The City again investigated Koerner's use of his property after complaints from the GDA. During this investigation, City inspectors found that Koerner did not have an occupational license, which is required for attorneys practicing in the City. The City issued a citation for failure to have such a license.

Koerner's commercial use of his property also impacted the tax status of that property. After purchasing 1204 Jackson, Koerner married Jeane Meade, who owned a house on the next block of Jackson Avenue. In 2000, Betty Jefferson, Assessor for the Fourth Municipal District of the City of New Orleans, investigated whether Koerner was entitled to a homestead exemption on 1204 Jackson. The GDA provided information to Jefferson as part of this investigation. Based on findings that Koerner operated a law office at 1204 Jackson, and that Meade and Koerner resided at 1314 Jackson Avenue, Jefferson determined that Koerner was not entitled to claim a homestead exemption for 1204 Jackson. Jefferson was initially a defendant in this proceeding, but all disputes between her and Koerner were resolved through a consent judgment.

In the present suit, Koerner alleges that the GDA encouraged the City to violate Koerner's civil rights. Koerner alleges that the City's issuance of a citation for his failure to obtain an occupational license and Jefferson's revocation of his homestead exemption for 1204 Jackson were influenced by the GDA.

In September of 2000, the GDA filed a motion to dismiss. The GDA asserted that the Koerner failed to state a cause of action because: (1) the GDA was not state a actor acting "under color of state law"; (2) any actions taken in petitioning the governmental bodies could not be the basis of any liability under the First Amendment pursuant to the Noerr-Pennington Doctrine; and (3)

that the court should not exercise its supplemental jurisdiction over the state law claims.

On April 2, 2001, the GDA filed suit in the Civil District Court for the Parish of Orleans in the matter styled as *Garden District Association v. Louis R. Koerner, Jr.*, C.A. No.2001-5737(H)(12) (hereinafter, "GDA Enforcement Action"). The GDA sought an injunction to prohibit Koerner from continuing his use of 1204 Jackson in a manner that violated the Comprehensive Zoning Ordinance.

On December 17, 2001, the trial court granted the GDA's motion to dismiss, ruling that: (1) the GDA is a private actor, and does not act under color of state law; (2) the GDA may levy complaints to the appropriate City departments and officers, report violations and seek enforcement of the laws; (3) all such actions of contact between the GDA and the City are protected by the First Amendment under the Noerr-Pennington Doctrine; and (4) that the court would not exercise its supplemental jurisdiction over the state law claims.

Ignoring the findings of the trial court's ruling, Koerner then filed a motion for leave to file his first amended complaint. Koerner sought to reassert the previously dismissed claims against the GDA and to add new claims seeking injunctive or declaratory relief that he had obtained a non-conforming commercial use of the property. This motion was granted in part and denied in part. The court refused to allow the reassertion of claims against the GDA; however, the court did allow Koerner to add claims for injunctive or declaratory judgment.

On February 24, 2003, during the pretrial conference, the trial court (1) continued the trial without date and (2) requested that the GDA file a motion to stay the matter pending resolution of the GDA Enforcement Action pending in state court.

The GDA filed a motion to stay on February 28, 2003, asserting that the trial court should stay the matter pending resolution of the GDA Enforcement Action pursuant to the Burford Abstention Doctrine. The GDA argued that the issues remaining to be tried were dependant upon the determination of the issue pending before the state court in the GDA Enforcement Action. On March 27, 2003, the trial court granted the motion to stay. This appeal followed.

II.
STANDARD OF REVIEW

We review the district court's determination to abstain for abuse of discretion. *Lipscomb v. The Columbus Municipal Separate School District*, 145 F.3d 238, 242 (5th Cir.1998).

III.
BURFORD ABSTENTION

The only remaining claims in this matter are: (1) alleged constitutional violations pertaining to the City's attempted enforcement of the Comprehensive Zoning Ordinance and the citation of Keorner for failing to have the requisite occupational law license; and (2) the City's defenses to those claims. The allegations made by Koerner depend on whether he has obtained a non-conforming use of 1204 Jackson, which is the issue presented in the parallel state proceeding.

Federal courts have a duty to exercise the jurisdiction conferred upon them by Congress and abstention is the exception not the rule. *Wilson v. Valley Electric Membership Corp.*, 8 F.3d 311 (5th Cir.1993). However, a number of abstention doctrines have been recognized by the Supreme Court, including the doctrine recognized in *Burford v. Sun Oil Company*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed.2d 1424 (1943).

In applying Burford abstention, the court does not necessarily consider whether the cause of action is based on state or federal law, but instead looks at whether the plaintiff's claim is entangled in an area of state law that must be untangled before the federal case can proceed. *Sierra Club v. City of San Antonio*, 112 F.3d 789, 795 (5th Cir.1997). Where timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are difficult questions of state law bearing on policy problems of substantial import whose importance transcends the result in the case at bar; or (2) where the exercise of federal review of the questions in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern. *St. Paul Ins. Co. v. Trejo*, 39 F.3d 585, 588 (5th Cir.1994).

Five factors have been identified to consider in making this determination: (1) whether the cause of action arises under state or federal law; (2) whether the case requires inquiry into

unsettled issues of state law or into local facts; (3) the importance of the state interest involved; (4) the state's need for a coherent policy in the area; and (5) the presence of a special state forum for judicial review. *Wilson*, 8 F.3d at 314. These factors support the trial court's determination to abstain in the current matter pending resolution of the parallel state proceeding.

Even though Koerner has framed his claims as arising under federal law, the underlying issues presented are purely state law issues. Koerner has alleged that the City's enforcement of the Comprehensive Zoning Ordinance and the Occupational Licensing law was wrongful. He has not alleged that these statutes are defective, only that their application to him is unconstitutional. Whether Koerner has established a non-conforming use of his property is purely a state law issue which should be decided in accordance with the adjudicatory process established to address zoning issues. The same is true of whether he has obtained an occupational license.

Further, the second, third, and fourth factors recognized by *Wilson* also favor abstention. Courts have recognized local land use and zoning as areas where local interest and coherent policy are necessary. *Pomponio v. Fauquier County Bd. of Supervisors*, 21 F.3d 1319, 1327 (4th Cir.1994), cert. denied, 513 U.S. 870, 115 S.Ct. 192, 130 L.Ed.2d 125. The court in *Pomponio* stated that federal courts should not leave their indelible print on local and state land use and zoning law by entertaining these cases, and, in effect, sitting as a zoning board of appeals. *Id.*

Finally, the fifth *Wilson* factor is present in this case. The City of New Orleans, the Board of Zoning Adjustment, and the Louisiana state courts have provided Koerner a forum for his grievances. The City determined in 1997 that Koerner had not achieved a nonconforming commercial use of his property. Thereafter, Koerner appealed that determination to the Board of Zoning Adjustment, which affirmed the decision. Koerner then appealed that determination to the Civil District Court for the Parish of Orleans and the Louisiana Fourth Circuit Court of Appeals. The denial of his non-conforming use was upheld.

The GDA Enforcement Action, the parallel state proceeding, is an action to enforce the determination already made by the BZA, and the Louisiana state courts. Koerner is now seeking to have the federal courts once again determine whether he has obtained a non-conforming use of his property. The trial

court properly rejected this attempt by abstaining to inject the federal courts into such local issues.

IV.
THE TRIAL COURT'S ORDER

Koerner argues that the trial court's order staying this matter was deficient because it did not contain an analysis of the Burford abstention doctrine. However, the order adopted the reasoning set forth by the GDA in its motion to stay by stating that it had received that motion and was granting it, finding that the issues presented in the state court proceeding were intertwined with the issues presented in this matter. The motion to stay was based solely on Burford abstention. Considering the facts of the case and the contents of motion to stay, the trial court's order was sufficient.

V.
CONCLUSION

For the foregoing reasons, we affirm the district court's decision.

C.A.5 (La.),2003.
Koerner v. Garden Dist. Ass'n
78 Fed.Appx. 960, 2003 WL 22427955 (5th Cir.(La.))

APPENDIX B

MOTION AND SUPPORTING MOMORANDUM

FOR STAY FILED IN

THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF LOUISIANA

CASE NO. 00-CV-2206-I

HON. JUDGE LANCE M. AFRICK, PRESIDING

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

LOUIS R. KOERNER, JR.	*	**CIVIL ACTION**
	*	**00-2206**
	*	
V.	*	**JUDGE LANCE M.**
	*	**AFRICK**
	*	
THE GARDEN DISTRICT	*	**MAG. JUDGE**
ASSOCIATION, ET AL.	*	**KAREN WELLS**
	*	**ROBY**

JOINT MOTION OF THE CITY OF NEW ORLEANS, PAUL MAY, THE GARDEN DISTRICT ASSOCIATION AND MICHELLE O. LANDRIEU TO STAY

NOW INTO COURT, through undersigned counsel, come defendants, the City of New Orleans ("City"), Paul May ("May"), and plaintiffs-in-counterclaim, the Garden District Association (the "GDA") and Michelle O. Landrieu, who, Jointly move this Court to stay the present matter pending the resolution of the issues presented in that matter styled as the Garden District Association v. Louis Koerner, C/A No. 2001-5737(H), currently pending in the Civil District Court for the Parish of Orleans, State of Louisiana ("State Court Suit"). As fully described in the memorandum in support filed herewith, the issues presented in the present matter are substantially intertwined with the issue of whether Plaintiff, Louis R. Koerner, Jr. ("Plaintiff" or "Koerner") has obtained a non-conforming use of the property located at 1204 Jackson Avenue, New Orleans, Louisiana ("Property"). That issue is pending in

the State Court Suit and this Court should abstain from injecting itself into this purely state law issue in the interest of comity.

ACCORDINGLY, the City of New Orleans, Paul May, the Garden District Association and Michelle O. Landrieu, pray that this Honorable Court grant the current motion and stay the current matter pending resolution of the issues presented in that matter styled as "The Garden District Association v. Louis R. Koerner, Jr ." currently pending in the Civil District Court for the Parish of Orleans, State of Louisiana.

KREBS, FARLEY & PELLETERI

/s/ Thomas M. Beh

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NEW ORLEANS AND PAUL MAY

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 28" day of February, 2003 served a copy of the foregoing pleading on Louis R. Koerner, Jr., Esq. by facsimile and on counsel for all other parties to this proceeding, by mailing same by United States mail, properly addressed and first class postage prepaid.

/s/ Thomas M. Beh

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

LOUIS R. KOERNER, JR.	*	**CIVIL ACTION**
	*	**00-2206**
	*	
V.	*	**JUDGE LANCE M.**
	*	**AFRICK**
	*	
THE GARDEN DISTRICT	*	**MAG. JUDGE**
ASSOCIATION, ET AL.	*	**KAREN WELLS**
	*	**ROBY**

MEMORANDUM IN SUPPORT OF THE JOINT MOTION OF THE CITY OF NEW ORLEANS, PAUL MAY, THE GARDEN DISTRICT ASSOCIATION AND MICHELLE O. LANDRIEU TO STAY

MAY IT PLEASE THE COURT:

The City of New Orleans ("City"), Paul May ("May"), the Garden District Association ("GDA") and Michelle O. Landrieu ("Landrieu"), present this memorandum in support of their motion to stay. As fully described below, the disputes remaining in this matter are dependant upon the resolution of the issue of whether Koerner has obtained a non-conforming use exempting his property at 1204 Jackson Avenue, New Orleans, Louisiana from the provisions of the City of New Orleans Comprehensive Zoning Ordinance ("Zoning Ordinance"). This issue is presently pending in that matter styled as The Garden District Association v. Louis R. Koerner,Jr. Cause of Action No. 2001-5737(H), Civil District Court for the

Parish of Orleans, State of Louisiana ("State Court Suit"). Consequently, this Court should stay the present matter pending resolution of the State Court Suit in the interest of comity and to conserve the judicial resources of this Court.

FACTS

Koerner is the owner of the property located at 1204 Jackson Avenue ("1204 Jackson" or 'Property") in the New Orleans' neighborhood known as the Garden District. The Property is zoned for residential, non-commercial use. Koerner has operated at various times a law practice at 1204 Jackson. This, within strict limits, is allowed under the applicable zoning requirements.[1] However, Koerner'S use of the Property has strayed beyond those limits.

Beginning in 1979, soon after Koerner's purchase of 1204 Jackson, the City of New Orleans cited Koerner for zoning violations at 1204 Jackson. The City alleged that Koerner was using in excess of 15% of the area of the property for the operation of a law practice. Apparently conceding the violation, Koerner reduced the size of the office space at 1204 Jackson to the 15% maximum, and a subsequent inspection by the City determined that the percentage area of the home used for his practice had been brought into compliance. However, this was not the end of

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[1] New Orleans Comprehensive Zoning Ordinance, Article 2, Section 1, Item 98, which states that a home occupation is allowed, so long as (1) it is carried on by a member of the family residing on premises; (2) no person not a resident is employed; and (2) not more that 15% of the floor area of the dwelling is used for the occupation. The operation of a law office is allowed under this provision if it meets these criteria.

the problems with Koerner.

In 1991, the City again investigated Koerner's use of 1204 Jackson for commercial purposes in violation of the applicable zoning regulations. After this second investigation, the City determined that Koerner was in violation of the zoning ordinances by having non-resident workers employed at 1204 Jackson. On or about July 17, 1991, May, then Zoning Administrator for the City of New Orleans, ordered Koerner to cease and desist his non-conforming use of the property. No further action was taken by the City in this regard.

In May of 1997, Koerner applied to the City of New Orleans for a permit to operate a "bed and breakfast" at 1204 Jackson. Koerner argued that he had acquired a right to a non-conforming use of the Property for commercial purposes, based on the failure of the city to act against his violation of the zoning ordinance in regard to the non-resident employees. The GDA opposed this application. On or about June 18, 1997, this application was denied by the City, through May. Koerner appealed May's decision to the regulatory agency with jurisdiction over zoning disputes, the City of New Orleans Board of Zoning Adjustment (the "BZA"). The BZA held a hearing on the matter on August 11, 1997, and then affirmed May's decision. The GDA opposed Koerner's application before the BZA.

Not willing to take no for an answer, Koerner filed suit in the Civil District Court for the Parish of Orleans, Civil Action No. 97-15968 ("BZA Appeal"), requesting a writ Of Certiorari, Mandamus and Declaratory Judgment, seeking to overturn the BZA's decision. The trial court's

affirmation of the BZA's decision to the Louisiana Fourth Circuit Court of Appeal, which also affirmed. Koerner v. City of New Orleans, 98-916 (La. Apr. 4th Cir. 1/9/99), 726 So.2d 435. Koerner's application for writ of certiorari was denied by the Louisiana Supreme Court. Koerner v. City of New Orleans, (La. 4/23/99),742 So.2d 883.

It appears that, even though faced with a final judgment from the Louisiana Fourth Circuit Court of Appeal stating that he was not exempt from the zoning regulations, Koerner continued with his commercial use of the property. After the Courts affirmed the BZA's decision, Koerner's neighbors continued to complain that he was operating a law office out of 1204 Jackson Avenue in violation of the Zoning Ordinance. These complaints, at least in part, were made through the GDA to the City. Thereafter, the City filed a motion for contempt, seeking to hold Koerner in contempt for his continued violation of the Zoning Ordinance. However, this motion was dismissed by order dated March 20, 2000, on procedural grounds. Although the Court had determined that Koerner had not acquired the right to use his property as he was using it, the City had failed to request an order expressly forbidding him to use it in that way.

Despite the clear holding of the BZA that he had not obtained a non-conforming use waiver, Koerner continued to use 1204 Jackson for commercial purposes. In April of 2001, the GDA filed the Civil District Court Suit, seeking an injunction against Koerner's continued use of the Property in violation of the Zoning Ordinance. A copy of the GDA's Complaint is attached as Exhibit "A". Koerner filed numerous exceptions in this matter, including

exceptions of prescription and of resjudicata ("Exceptions"). These exceptions are pending and are set for hearing on March 28,2003. Copies of the Exception are attached as Exhibit "B".

Koerner filed the present matter in July of 2000. In his Complaint, Koerner alleged, *inter alia,* that the City violated his constitutional rights pertaining to the motion for contempt and a citation issued to Koerner for failure to have an occupational license.[2] In Koerner sought injunctive relief against the defendants "preventing them from continuing the course of actions that wrongfully deprives [Koerner] of his constitutional rights and that cause him other harm." See Complaint, ¶48. Koerner also sought a Writ of Mandamus, requiring defendants to honor his homestead exemption and addressing issues pertaining to the assessment value of the Property. See Complaint, ¶52-55. Koerner made no claim for any other injunctive relief.

Plaintiff filed a Motion for Leave to File on Amended Complaint in October, 2000. However, that motion was denied without prejudice by Magistrate Judge Roby on February 2,2001. Thereafter, in June, 2002, Koerner again sought leave to amend his complaint in the

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[2] Additional allegations pertaining to the revocation of Koerner's homestead exemption, the assessment value of the Property and claims against the GDA and Landrieu have previously been resolved and/or dismissed and are no longer at issue in this matter, All claims against the GDA and Landrieu have been dismissed, but the GDA and Landrieu remain Plaintiff-in-Counterclaim in this matter.

present matter, seeking to add new parties and new claims to this litigation. See Record Document No. 135, filed June 21, 2002. The GDA and Landrieu opposed that motion. On December 23, 2002, Magistrate Judge Roby granted in part and denied in part Koerner's motion for leave, allowing Koerner to file amended claims against the City of New Orleans, but not allowing the proposed claims to be asserted against the GDA or Landrieu, and precluding Koerner from naming the Garden District Security District ("GDSD") and the insurers of the GDA and GDSD as defendants. See Record Documents 151.

On January 6, 2003, Koerner filed his First Amended Complaint and Jury Demand ("Amended Complaint"). See Record Document No. 156. The Amended Complaint asserts the same allegations against the City of New Orleans and Paul May. No other parties are named as defendants. However, in the prayer for relief in this Amended Complaint, Koerner for the first time attempts to seek injunctive relief declaring that enforcement of the Zoning Ordinance against his use of the property is barred by prescription and res judicata. See Amended Complaint pg. 25, Record Document 156, Prayer for Relief at Paragraphs 2 and 3. These identical issues are pending before the Civil District Court in connection with the Exceptions filed by Koerner in the State Court Suit.

Through the Amended Complaint, Koerner has attempted to expand the relief sought from this Court to include injunctive relief effectively precluding the City of New Orleans and the GDA (as an interested party) from seeking to enforce the land use policies, and zoning

ordinances, as established by the City of New Orleans. The Court should abstain from delving into this area of local regulation in the interest of comity as land use policies are an area of special interest to the City of New Orleans and the uniform application of those policies is of great importance.

Further, the claims asserted against the City are dependant upon whether Koerner has established a non-conforming use of his Property. For example, the City and May have plead the affirmative defense of qualified immunity. If Koerner has not obtained a non-conforming use of his Property, then the actions of the City in seeking to enforce the Zoning Ordinance are unlikely to constitute a deprivation of a clearly established constitutional or statutory right, thus making the City and May immune from liability. See Homeowner/Contractor Consultants, Inc. v. Ascension Parish Planning and Zoning Com'n, 32 F.Supp.2d 390 (M.D. La. 1999). Thus, the resolution of the issues presented in the State Court Suit will directly impact all of the issues presented in this Court and a stay of this matter pending resolution of the State Court Suit is appropriate.

ARGUMENT

1. The Remaining Issues in the Matter Center on the Enforcement of the New Orleans Comprehensive Zoning Ordinance.

The remaining claims in this matter are as follows: (1) Koerner's claims pertaining to the City's attempted enforcement of the Comprehensive Zoning Ordinance

through a Motion for Contempt, and his citation with respect to the occupational licence law[3]; (2) the City's and Paul May's defenses to those claim, including the assertion of qualified immunity; and (3) the Counterclaim asserted by the GDA and Landrieu. All other claims - including Koerner's claims against the GDA, Landrieu, and Betty Jefferson - have been resolved and/or dismissed. In essence, while couched as federal constitutional claims, the allegations made by Koerner, and the relief sought, now depend in large part on whether or not he has obtained a non-conforming use of the Property. That is the issue presented in the State Court Suit. This Court should abstain from exercising its jurisdiction, and stay the present matter pending the resolution of the State Court Suit.

11. Abstention Under the Burford Doctrine Is Appropriate as Land Use Policy Decisions Should be Reserved to State Court Review.

The City, the GDA and Landrieu acknowledge that the federal courts have a duty to exercise the jurisdiction conferred upon them by Congress and that abstention is the exception not the rule. See Wilson v. Valley Electric Membership Corp., 8 F.3d 311 (5th Cir. 1993). However, a number of abstention doctrines have been enunciated by the Supreme Court in those situations, like that at issue, when the Court should not exercise its jurisdiction.

[3] The claims raised by the Intervention of Mr. Ridlon are limited to the issues pertaining to the Occupational Licencing law. However, these issues again turn on the non-conforming use status of the Property as the reason stated by Ridlon for the denial of an occupational licence was the City's position that the operation of a law office at that location identified in Ridlon's application was in violation of the Zoning Ordinance.

Specifically, that doctrine recognized in Burford v. Sun Oil Company 319U.S. 315, 63 S.Ct. 1098, 87 L.Ed.2d 1424 (1943) is applicable.

In Burford, Sun Oil Company challenged a drilling permit issued by the Texas Railroad Commission, contending that its issuance violated state law and the federal Due Process Clause. The Supreme Court held that the district court should have abstained based on the comprehensive nature of the state law regulatory scheme, the large interest of the state in regulating its oil and gas business, and the need for a unified approach to such issues. Id. See also, Metro Riverboat, Assoc. Inc. v. Bally's Louisiana, Inc., 142 F.Supp.2d 765 (E.D.La. 2001).

The policy behind the Burford abstention doctrine is that the federal courts should not inject themselves into disputes pertaining to areas of purely local and/or state interest when adequate forums are available to address those disputes. The Fifth Circuit described the reasoning behind Burford abstention as follows:

> Burford abstention does not so much turn on whether the plaintiff's cause of action is alleged under federal or state law, as it does whether the plaintiff's claim may be "in any way entangled in a skein of state law that must be untangled before the federal case can proceed."

Sierra Club v. City of San Antonio, 112 F.3d 789, 795 (5th Cir. 1997). The Supreme Court has recognized that such circumstances sometimes require the federal courts to abstain to allow the state's regulatory scheme to operate without the risk of competing attempts to exercise control

over the same issues. Id. This policy supports the Court's abstention in the current matter.

The Supreme Court has stated that there is no "formulaic" approach to the application of the Burford doctrine. However, five factors have been identified to consider in making this determination: (1) whether the cause of action arises under state or federal law; (2) whether the case requires inquiry into unsettled issues of state law or into local facts; (3) the importance of the state interest involved; (4) the state's need for a coherent policy in the area; and (4) the presence of a special state forum for judicial review. See Wilson, 8 F.3d at 314, Metro Riverboat, 142 F.Supp.2d at 774. These factors support the Court abstaining in the current matter pending resolution of the State Court Suit.

First, while Koerner has couched his claims as arising under federal law, the underlying issues presented - i.e. the enforcement of the Comprehensive Zoning Ordinance and the Occupational Licencing laws - are purely state law issues. In essence, what Koerner has alleged is that the City's enforcement of the Comprehensive Zoning Ordinance and the Occupational Licencing law was wrongful. He has not alleged that these statutes are defective, only that their application to him is somehow suspect. Whether Koerner has established, by whatever means, a non-conforming use of his property is purely a state law issue. The same is true of whether he has obtained, or is required to obtain, an occupational licence.

Additionally, the fact that Koerner alleged a violation of his constitutional rights is not dispositive. In Burford, the

Court abstained from ruling on the issues of an alleged due process violation. See Sierra Club, 112 F.3d at 796. Further, in Sierra Club, the Court abstained from hearing plaintiff claims under the Endangered Species Act. Id. In reaching this determination, the Fifth Circuit acknowledged that "abstention is appropriate whether jurisdiction is premised on diversity jurisdiction or otherwise, if the federal courts should, consistent with our federal system, afford comity to state governments in carrying out their domestic policy." Id.[4] In the present case, the appropriate forum to control land use and zoning issues is the Civil District Court for the Parish of Orleans. This Court should not interfere with that body's regulation of local land use.

The second, third and fourth factors — i.e. the existence of local facts, the importance of the state interest involved and, the state's need for a coherent policy in this area - also clearly favor abstention. Since the development of Burford abstention, one of the specific areas that has been cited by the Courts as an example of an arena where local interest and coherent policy are necessary is in local land use and zoning. Pomponio v. Fauquier Country Bd. of Supervisors, 21 F.3d 1319, 1327 (4th Cir. 1994), cert denied, 115 S.Ct. 192.("We have also reiterated that state

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[4]While Burford initially dealt with the dismissal of claims made in equity, The Supreme Court has subsequently made it clear that the concept is equally applicable when damages are sought, but that a stay rather than dismissal is the proper course of action. See Quackenbush, v. Allstate Ins. Co., 517 U.S. 706, 116 S.Ct. 1712, 135 L.Ed.2d 1 (1996); New Orleans Public Service Inc., v. Council of the City of New Orleans, 491 U.S. 350, 109 S.Ct. 2506, 105 L.Ed.2d 298 (1989). In the present case, the City of New Orleans, the GDA and Landrieu are only seeking a stay of the present matter pending the resolution of the State Court Suit.

and local zoning and land use law is particularly the province of the state and the federal courts should be wary, of intervening in that area in the ordinary case."). The Court in Pomponio went on to state as follows:

> In light of the Supreme Court's recent guidance on the Burford abstention, in which the Court stated that "we have distilled the principle now commonly referred to as the "Burford doctrine," we are convinced of the correctness of our view, for we believe that cases involving questions of state and local land use and zoning law are a classic example of situations in which the exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.

Id., citing New Orleans Public Service Inc. v. Council of New Orleans, 491 U.S. 350, 109 S.Ct. 2506, 105 L.Ed.2d 298 (1989). Finally, the Court in Pomponio stated as follows:

> We believe that in the usual case federal courts should not leave their indelible print on local and state land use and zoning law by entertaining these cases, and, in effect, sitting as a zoning board of appeals.

Id. at 1327.

In the present case, the local interest in the regulation of the use of property is of the utmost importance. In fact, as recognized by the Pomponio Court, it may indeed

be the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life. Id. at 1327. Further, the need for a coherent policy is critical in the present matter as uniform application of those policies is the only way to preserve the specific and fragile atmosphere of this unique city.

The fifth factor- i.e. the presence of a special state forum for review - is also present. In this case, the issue of whether Koerner has achieved a non-conforming use of his property has been decided by that forum. The City, throught Paul May, determined in 1997 that he had not achieved a non-conforming commercial use of the property. Thereafter, and in accordance with the forum for review of such determinations, Koerner appealed that determination to the Board of Zoning Adjustment, which affirmed May's decision. Koerner then appealed that determination to the Civil District Court for the Parish of Orleans and the Louisiana Fourth Circuit Court of Appeal. In each instance, the denial of his non-conforming use was upheld. Ultimately, the Louisiana Supreme Court denied the application for review.

What Koerner is now seeking is to have this Court take yet another bite at the apple of whether he has obtained a non-conforming use of his property. This Court should not accept this invitation to inject itself into such local issues.

CONCLUSION

The critical issue underlying all the claims remain-

ing in this matter is whether Koerner presently has, or had in 2000, obtained a non-conforming use of his property at 1204 Jackson Avenue. To date, the City of New Orleans, the Board of Zoning Adjustment, the Civil District Court for the Parish of Orleans and the Louisiana State Fourth Circuit Court of Appeal have ruled that he does not have non-conforming use status. Unhappy with that result, and the City's actions to enforce the Zoning Ordinance, Koerner has sought to have this Court again review that issue, under the guise of a constitutional claim. This Court should reject this invitation to inject itself into the administration of local issues of land use and zoning. Rather, the Court should grant the current motion, and stay the proceedings in this matter pending the resolution of these purely state law issues by the Civil District Court for the Parish of Orleans. Consequently, the City of New Orleans, Paul May, the Garden District Association and Michelle O. Landrieu request that this Court grant the current Motion, stay this matter pending resolution in the State Court suit.

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